

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: March 1, 2012

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Analysis (Clemence)
Office of the General Counsel (Page) *MA ALT*

RE: Docket No. 120012-EI – Petition for variance and waiver of certain contractual requirements in Rule 25-6.065, F.A.C., by Progress Energy Florida, Inc. *FAP S.M.C.*

AGENDA: 03/13/12 – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: 04/05/12 (Commission must grant or deny petition by this date.)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RAD\WP\120012.RCM.DOC

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Case Background

Rule 25-6.065(3), Florida Administrative Code (F.A.C.), required each investor-owned utility (IOU) to file for Commission approval a Standard Interconnection Agreement for expedited interconnection of customer-owned renewable generation up to two megawatts. Rule 25-6.065(5), F.A.C., sets forth the minimum contents of a Standard Interconnection Agreement.

By Order No. PSC-08-0624-TRF-EI, issued September 24, 2008, in Docket Nos. 080255-EI, 080257-EI, 080260-EI, and 080265-EI, In re: Petition for approval of standard interconnection agreements for expedited interconnection of customer-owned renewable generation, the Commission approved tariffs incorporating the standard interconnection agreements of each IOU. In Order No. PSC-08-0624-TRF-EI, the Commission recognized that

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the requirements of Rule 25-6.065, F.A.C., represented a new process and as the IOUs gain experience they can request tariff revisions.

On January 6, 2012, Progress Energy Florida, Inc. (PEF), filed a petition for variance and waiver of the requirements of subparagraphs (5)(d) and (e) of Rule 25-6.065, F.A.C., to enter into a Standard Interconnection Agreement with the University of Central Florida (UCF). Notice of the petition was published in the Florida Administrative Weekly on January 20, 2012. The comment period expired on February 3, 2012, and no comments were received.

PEF requests a variance and/or a waiver from these rules because UCF informed PEF that it cannot legally agree to the indemnification language required by Rule 25-6.065(5)(d), F.A.C. and cannot obtain the \$1 million in liability insurance required by PEF's tariff and described in Rule 25-6.065(5)(e), F.A.C.

This recommendation addresses whether the Commission should grant PEF's petition. The Commission has jurisdiction pursuant to sections 366.04, 366.05, and 366.06, Florida Statutes (F.S), as well as section 120.542, F.S.

Discussion of Issues

Issue 1: Should the Commission grant PEF's petition for variance and waiver of the requirements of Rules 25-6.065(5)(d) and (e), F.A.C., and modification of PEF's tariff to allow PEF to execute a Standard Interconnection Agreement for Tier 2 Customer-Owned Renewable Generation Systems with UCF?

Recommendation: Yes. Subparagraph (5)(d) of Rule 25-6.065, F.A.C., should be waived, and PEF should be allowed to strike the first sentence of paragraph 11 of its Standard Interconnection Agreement and change the reference to "one million dollars (\$1,000,000)" in paragraph 8 of its Standard Interconnection Agreement to "\$200,000 per person/\$300,000 per occurrence." It does not appear, however, that a rule waiver and/or variance of subparagraph (5)(e) is necessary. PEF should be put on notice that the rule waiver and tariff modifications only apply to the execution of a Standard Interconnection Agreement with UCF. (Page, Clemence)

Staff Analysis: PEF wishes to execute a Standard Interconnection Agreement with UCF for Tier 2 customer-owned renewable generation. PEF states that, since UCF is a state agency, UCF cannot legally agree to indemnity provisions and cannot obtain \$1 million in general liability insurance without UCF waiving its sovereign immunity. Thus, PEF seeks a waiver and/or variance of subparagraphs (5)(d) and (e) of Rule 25-6.065 and requests permission to strike the first sentence of paragraph 11 of its Standard Interconnection Agreement and change the reference to "one million dollars (\$1,000,000)" in paragraph 8 of its Standard Interconnection Agreement to "\$200,000 per person/\$300,000 per occurrence."

A. **Specific Provisions of Rule 25-6.065(5) and Tariff that PEF is Seeking To Be Waived/Modified**

Rule 25-6.065(5), F.A.C., lists the minimum contents of a Standard Interconnection Agreement and requires in pertinent part:

(d) A provision that the customer shall hold harmless and indemnify the investor-owned utility from all loss to third parties resulting from the operation of the customer-owned renewable generation, except when the loss occurs due to the negligent actions of the investor-owned utility. A provision that the investor-owned utility shall hold harmless and indemnify the customer for all loss to third parties resulting from the operation of the investor-owned utility's system, except when the loss occurs due to the negligent actions of the customer.

(e) A requirement for general liability insurance for personal and property damage, or sufficient guarantee and proof of self-insurance, in the amount of no more than \$1 million for Tier 2, and no more than \$2 million for Tier 3.

PEF's Standard Interconnection Agreement for Tier 2 systems, approved by the Commission pursuant to Rule 25-6.065(5), F.A.C., and contained in PEF's tariff, states in pertinent part:

8. The Company requires that the Customer maintain general liability insurance for personal injury and property damage in the amount no less than one million dollars (\$1,000,000).

11. The Customer shall hold harmless and indemnify the Company for all loss to third parties resulting from the operation of the customer-owned renewable generation, except when the loss occurs due to the negligent actions of the Company. The Company shall hold harmless and indemnify the Customer for all loss to third parties resulting from the operation of the Company's system, except when the loss occurs due to the negligent actions of the Customer.

B. Requirements for Granting Agency Variances and Waivers Pursuant to Section 120.542(2), F.S.

Section 120.542(2), F.S., 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 demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver.

Rules 28-104.002(2)(g) and (h), F.A.C., implement section 120.54, F.S., and state that the petition for a variance or waiver must include "[t]he specific facts that demonstrate a substantial hardship or a violation of principles of fairness that would justify a waiver or variance for the petitioner" and show "[t]he reason why the variance or the waiver requested would serve the purposes of the underlying statute."

C. PEF's Petition

1. Purpose(s) of the Underlying Statute

PEF states the underlying statutes implementing Rule 25-6.065, F.A.C., are sections 366.81, 366.82(1) and (2), 366.91(1) and (2), and 366.92, F.S. PEF states that "each of these sections concern renewable energy and reflect the Legislature's intent to promote the development of renewable energy." PEF further states that "[n]one of these statutory sections dictate the provisions that are to be included in the Standard Interconnection Agreement."

PEF states that it is only seeking a waiver and variance in a limited instance from two requirements to be included in the Standard Interconnection Agreement, so that PEF's customer, a state agency, can execute the agreement and not waive its sovereign immunity. PEF states that even with the waiver and variance, the purpose of the underlying statute – to encourage renewable energy generation – will still be achieved.

2. Substantial Hardship or Principles of Fairness

PEF asserts enforcement of Rule 25-6.065, F.A.C. would require UCF to waive its sovereign immunity. PEF states that UCF, as a state university board of trustee, is considered a state agency and thus subject to the limitations contained in section 768.28, F.S. PEF states that section 768.28(5), F.S., provides that “[n]either the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any person which exceeds the sum of \$200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising of the same incident or occurrence, exceeds \$300,000.” PEF cites to Attorney General Opinions interpreting section 768.28, F.S.¹ PEF states that based on the statute and the Attorney General Opinions, UCF cannot agree to the indemnification provision in Rule 25-6.065(d), F.A.C., and in PEF's tariff. PEF also asserts that UCF cannot agree to the \$1 million in general liability insurance required by Rule 25-6.065(e), F.A.C., and PEF's tariff because UCF cannot obtain general liability insurance in excess of the amounts set forth in section 768.28, F.S., (i.e., \$200,000 per person/\$300,000 per occurrence). PEF, thus, concludes that, without a variance and waiver, UCF cannot enter into a contract with PEF to deploy its renewable energy generation system.

D. Conclusion

Section 768.28(5), F.S., states in pertinent part:

Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$300,000.

It appears that UCF falls within the general protection of immunity from suit given to state agencies. Because of the state agency immunity law in section 766.28, F.S., it appears that UCF cannot accept paragraphs 8 and 11 of PEF's Standard Interconnection Agreement.

1. Rule Waiver

Staff agrees with PEF that the purpose of the underlying statutes implementing Rule 25-6.065, F.A.C., is to encourage the development of renewable energy facilities. Staff believes that PEF has met its burden to demonstrate that the underlying purpose of the statutes will still be

¹ Op. Att'y Gen. Fla. 00-22 (2000)(county may not agree to indemnify another party to a contract or alter state's waiver of sovereign immunity); Op. Att'y Gen. Fla., 99-56 (1999)(agency may not enter into agreement altering the state's waiver of sovereign immunity); and Op. Att'y Gen. Fla. 90-21(1990)(Dep't. of Corrections not authorized to alter the state's waiver of immunity in tort).

achieved even if the waiver and/or variance is granted. Indeed, it appears that granting the rule waiver is necessary for PEF and UCF to enter into the interconnection agreement, which, in turn, will increase renewable energy generation in Florida.

Moreover, staff believes that PEF has demonstrated that application of subparagraph (5)(d), of Rule 25-6.065, F.A.C., the indemnification provision, would create a substantial hardship of a legal nature for PEF. If the rule is not waived and/or varied, PEF will not be able to execute an agreement with UCF.

Staff points out, however, that subparagraph (5)(e) of Rule 25-6.065, F.A.C., only requires general liability insurance in an amount of no more than \$1 million. Thus, it does not appear that a waiver and/or variance of subparagraph (5)(e) is necessary to include a general liability insurance requirement in the Standard Interconnection Agreement in the amount of \$200,000 per person/\$300,000 per occurrence.

2. Tariff Modifications

In addition to the rule waiver and/or variance, PEF is also requesting that it be allowed to modify the tariff provisions corresponding with Rule 25-6.065(5), F.A.C.

PEF's Standard Interconnection Agreement for Tier 2 systems, approved by the Commission pursuant to Rule 25-6.065(5), F.A.C., and contained in PEF's tariff, states in pertinent part:

8. The Company requires that the Customer maintain general liability insurance for personal injury and property damage in the amount no less than one million dollars (\$1,000,000).

11. The Customer shall hold harmless and indemnify the Company for all loss to third parties resulting from the operation of the customer-owned renewable generation, except when the loss occurs due to the negligent actions of the Company. The Company shall hold harmless and indemnify the Customer for all loss to third parties resulting from the operation of the Company's system, except when the loss occurs due to the negligent actions of the Customer.

Paragraph 8 of the Standard Interconnection Agreement contained in PEF's tariff requires a minimum of \$1 million in general liability insurance for a Tier 2 Interconnection. Rule 25-6.065(5)(e) specifies an amount up to \$1 million. As discussed above, there is no need for a rule waiver and/or variance for PEF to modify the general liability insurance requirement, but Commission Rule 25-9.001(3) requires Commission approval for any modifications to approved tariffs. Similarly, Paragraph 11 of the Standard Interconnection Agreement requires an indemnification provision identical to subparagraph (5)(d) of Rule 25-6.065, F.A.C. While the rule waiver discussed above relieves the utility from the requirement to include indemnification

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language in its tariff, it is appropriate to formally approve the proposal to modify the tariff by removing this language.

While there is no legal standard for tariff modifications such as the one set forth in section 120.542, F.S., for rule waivers, staff believes PEF has provided sufficient justification in this instance for the Commission to allow PEF to modify its Commission-approved tariff to enter into a Standard Interconnection Agreement with UCF.

Staff recommends that the Commission grant PEF's petition to allow PEF to execute a Standard Interconnection Agreement for Tier 2 Customer-Owned Renewable Generation Systems with UCF. Subparagraph (5)(d) of Rule 25-6.065, F.A.C., should be waived, and PEF should be allowed to strike the first sentence of paragraph 11 of its Standard Interconnection Agreement and change the reference to "one million dollars (\$1,000,000)" in paragraph 8 of its Standard Interconnection Agreement to "\$200,000 per person/\$300,000 per occurrence." It does not appear, however, that a rule waiver and/or variance of subparagraph (5)(e) is necessary. PEF should be put on notice that the rule waiver and tariff modifications only apply to the execution of a Standard Interconnection Agreement with UCF.

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Issue 2: 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 date of the order arising from this recommendation, the docket should be closed upon the issuance of a consummating order.

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Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance date of the order arising from this recommendation, the docket should be closed upon the issuance of a consummating order.