

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval to terminate
qualifying facility power purchase agreement
with Florida Power Development, LLC, by
Duke Energy Florida, LLC.

Docket No.: 20170274-EQ

Filed May 25, 2018

CONSOLIDATED RESOURCE RECOVERY, INC'S PETITION FOR A HEARING
CHALLENGING PROPOSED AGENCY ACTION ORDER PSC-2018-0240-PAA-EQ
APPROVING TERMINATION OF POWER PURCHASE AGREEMENT
BETWEEN DUKE ENERGY FLORIDA, LLC
AND FLORIDA POWER DEVELOPMENT, LLC

Pursuant to Sections 120.57(1) and 120.569, Florida Statutes ("F.S."), and Rules 25-22.029, 25-22.039, and 28-106.201, Florida Administrative Code ("F.A.C."), and any other applicable statutes and rules, Consolidated Resource Recovery, Inc. ("CRR") hereby petitions for a hearing in Docket No. 20170274-EQ challenging the Proposed Agency Action Order No. PSC-2018-0240-PAA-EQ, issued on May 8, 2018 (the "PAA Order"). In the PAA Order, the Florida Public Service Commission (the "Commission") proposed approving a Termination Agreement of a Power Purchase Agreement ("PPA") between Duke Energy Florida, LLC ("DEF") and Florida Power Development, LLC ("FPD") because CRR is a third party beneficiary of the PPA substantial interests of CRR and its employees will be impacted by the termination of the PPA. In support, CRR states as follows:

Affected Agency

1. The affected agency is the Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399. The file identification number is Docket No.: 20170274-EQ.

2. The Petitioner is CRR. CRR is represented by Richard J. Santurri, Esq. Copies of all notices, pleadings, orders and other communications in this docket should be provided to:

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Notice of Receipt of Action

3. CRR obtained a copy of the PAA from the Commission's website on May 25, 2018.

Background

4. CRR is a foreign for-profit corporation authorized to do business in Florida, with its principal place of business in Manatee County, Florida.

5. FPD is a foreign for-profit limited liability company authorized to do business in Florida with its principal place of business in Houston, Texas.

6. DEF is a Florida limited liability company with headquarters at 299 1st Avenue North, St. Petersburg, Florida 33701. DEF is an investor-owned utility operating under the jurisdiction of this Commission pursuant to the provisions of Chapter 366, Florida Statutes, and is a wholly-owned subsidiary of Duke Energy Corporation.

7. CRR is a procurer and seller of biomass fuel material. CRR is a privately-owned company that employs approximately 75 employees in Florida who depend on CRR's contract with FPD for their livelihoods.

8. FPD is the owner and operator of a biomass electric power production facility located in Brooksville, Florida (the "Facility"). The Facility exists for the sole purpose of selling energy to DEF.

9. FPD buys the biomass to generate electrical power at its facility, and sells that power to DEF pursuant to the PPA.

10. In 2014, CRR sued FPD for a declaration that the parties' then-existing fuel procurement agreement was terminated, and sought damages related thereto.

11. In April 2016, CRR and FPD entered into the Settlement Agreement and Mutual Release (the "Settlement Agreement"), which incorporated the 2016 Fuel Procurement and Processing Agreement between the parties, later amended on June 28, 2016 in the First Amendment to the 2016 Fuel Procurement and Processing Agreement (collectively the "2016 Fuel Agreement").

12. The 2016 Fuel Agreement, whereby CRR would procure and FPD would purchase biomass fuel material for the production of biomass electric power, supplanted and superseded all prior agreements between the parties. Settlement Agreement at pg. 3. A copy of the Settlement Agreement, 2016 Fuel Agreement, and First Amendment to the 2016 Fuel Agreement will not be filed with this petition due to the confidentiality provisions therein until court order is secured. In the meantime, the terms of the agreements are incorporated herein.

13. After entering into the agreements, the 2014 action, including a counterclaim filed by FPD, was dismissed upon stipulation and agreement of both parties. The Court entered the

Agreed Order of Dismissal with Prejudice on August 10, 2016. Thereafter, the parties proceeded to perform under the 2016 Fuel Agreement. CRR continued to procure and sell biomass fuel to FPD.

14. The 2016 Fuel Agreement is for a term of 10 years, from April 15, 2016 to April 15, 2026. (2016 Fuel Agreement, which is incorporated herein, at Section 2(A)).

15. The 2016 Fuel Agreement provided that CRR would sell and FPD would purchase on a monthly average “not less than 5000 Green Tons of biomass fuel. . .” (2016 Fuel Agreement, which is incorporated herein, at Section 2(B)).

16. Throughout the term of the predecessor agreements and the 2016 Fuel Agreement, FPD has been fully aware that the fuel provided by CRR to FPD constitutes a vast majority of CRR’s entire business activity. FPD was also aware that the predecessor agreements and the 2016 Fuel Agreement were predicated on the PPA.

17. Unbeknownst to CRR, within less than 2 years subsequent to the commencement of the 2016 Fuel Agreement, FPD had negotiated and agreed with DEF to dismantle and close the Brooksville facility in 2018, with 8 years remaining on CRR’s 2016 Fuel Agreement. In its negotiations with DEF, FPD has agreed to accept approximately \$113,100,000.00 from DEF in exchange for closing its facility and releasing DEF from its further obligations to purchase energy from FPD.

18. CRR believes that the damages accruing to CRR for the 8 years remaining on the 2016 Fuel Agreement were taken into consideration in the negotiations between DEF and FPD; and are represented in or are part and parcel of the \$113,100,000.00 which FPD has agreed to accept from DEF. However, FPD willfully, intentionally and maliciously does not intend, and

never did intend, to pay CRR any damages pursuant to the 2016 Fuel Agreement; but instead FPD intends to keep the entire \$113,100,000.00.

19. If the Termination Agreement is approved, in accordance with its terms ,FPD will be required to shut down and dismantle the Brooksville facility and wind down it Brooksville operations and related business entity thereby leaving CRR with no remedy for the damages it will suffer as a result of the shutdown and termination.

20. The Termination will undoubtedly result in CRR's inability to continue business as a significant processor of bio-mass fuels in the state of Florida which would be detrimental to the environment and adversely impact all Floridians including the customers of DEF.

State of Substantial Interests

21. CRR meets the administrative and associational standing requirements to protest the PAA Order. Rule 25-22.029(3), F.A.C.

22. First, CRR satisfies the two requirements for administrative standing, as outlined in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981) *rehearing denied*, 415 So.2d 1359 (Fla. 1982). Specifically, this test requires (a) an injury in fact of sufficient immediacy to entitle the petitioner to a hearing under Section 120.57; and (b) substantial injury of a type or nature that the proceeding is designed to protect. *Agrico Chemical*, 406 So.2d at 482.

23. CRR meets the first prong of the *Agrico* test because allowing termination and abandonment of the facility would constitute an injury in fact of sufficient immediacy to the organization and its members. Specifically, the PAA Order approving the Termination Agreement would: (1) deny CRR due process protections prescribed by Section 120.57, F.S.; (2) deprive CRR, of the assurance that the Commission has sufficient information to evaluate the

benefits and consequences of the Termination Agreement; (3) expose CRR to financial harm by allowing the Brooksville facility to be shutdown without taking into consideration the impact it would have on biomass supplier CRR and (4) undermine the contractual relationship that exists between CRR and FPD, which is entirely predicated on the PPA between FPD and DEF.

24. CRR meets the second prong of the *Agrico* test because the Commission has approval authority for the Termination Agreement. The Termination Agreement indicates that DEF will pay \$113,100,000 to FPD to terminate the PPA. Upon information, this amount included a component for the damages accruing to CRR for the 8 years remaining on the 2016 Fuel Agreement. DEF has indicated that it intends to recoup this amount from consumers through the Fuel Clause. This will result in a windfall for FPD at the expense of Florida consumers.

Disputed Issues of Material Fact

25. CRR disputes the following issues of material fact:
- a. Whether the PPA is no longer cost effective and whether it exceeds DEF current avoided costs.
 - b. Whether the Termination Agreement benefits DEF customers.
 - c. Whether the payment under the Termination Agreement should be considered a Regulatory Asset.
 - d. Whether the Termination Agreement will yield environmental benefits.

Statement of Ultimate Facts

26. CRR alleges the following ultimate facts:
- a. The PPA is cost effective and it does not exceed DEF current avoided costs.
 - b. The Termination Agreement does not benefit DEF customers.

- c. The payment under the Termination Agreement should not be considered a Regulatory Asset.
- d. The Termination Agreement will not yield an environmental benefit.
- e. CRR's agreement with FPD was dependent upon FPD's agreement with DEF.
- f. When DEF and FPD negotiated termination payment, FPD is believed to have included a factor for the termination of the agreement between FPD and CRR.
- g. The Termination Agreement will harm CRR and its Florida employees.

Statement of Rules and Statutes Requiring Reversal of the Agency's Decision

26. CRR is not aware of any specific rules or statutes that would mandate that the Commission not approve the proposed Termination Agreement. However, the Commission has jurisdiction over this matter pursuant to Sections 366.051, 366.81, and 366.9. F.S.

Relief Requested

WHEREFORE, CRR request that the Commission:

- a. Conduct a formal evidentiary hearing under Sections 120.569 and 120.57(1) on issues of disputed fact and law raised by this petition; and
- b. Deny DEF's petition for approval of the Termination Agreement.

Dated this 25th day of May, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically on this 25th day of May, 2018 on:

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