I. Meeting Packet

State of Florida
Public Service Commission
INTERNAL AFFAIRS AGENDA
Tuesday - April 06, 2010
Immediately Following Agenda Conference
Room 140 - Betty Easley Conference Center

---

1. Approve March 16, 2010, Internal Affairs Meeting Minutes. (Attachment 1)

2 FPSC Draft Comments in Response to Florida Power & Light's Petition for Declaratory Order in FERC (Federal Energy Regulatory Commission) Docket No. EL 10-43. Guidance is sought. (Attachment 2)

3. Nuclear Waste Litigation at the Nuclear Regulatory Commission. Guidance is sought. (Attachment 3)

4. Legislative Update. (No attachment)

5. Other matters, if any.

TD/sa

OUTSIDE PERSONS WISHING TO ADDRESS THE COMMISSION ON ANY OF THE AGENDAED ITEMS SHOULD CONTACT THE OFFICE OF THE EXECUTIVE DIRECTOR AT (850) 413-6068.

Attachment 1

Attachment 1

State of Florida

Public Service Commission
INTERNAL AFFAIRS AGENDA
Tuesday - March 16, 2010
11:22 am – 12:00 pm
6:45 pm – 8:45 pm
Room 140 - Betty Easley Conference Center

COMMISSIONERS PRESENT: Chairman Argenziano
Commissioner Edgar
Commissioner Skop
Commissioner Klement
Commissioner Stevens

STAFF PARTICIPATING: Devlin, Hill, Kiser, Pennington, Willis, Cibula

OTHERS PARTICIPATING: Mike Murtha and Diep Tu – Florida Concrete and Products Association

1. Approve February 9, 2010, Internal Affairs Meeting Minutes.

   The minutes were approved.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

2. Presentation on Concrete and Lighter Color Horizontal Surfaces Reducing the Heat Island Effect and, in Turn, Energy Consumption by the Florida Concrete and Products Association. Presenter: Karl Watson, Jr.

   Power Point presentation by Mike Murtha and Diep Tu, followed by a discussion with the Commissioners.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

3. Discussion of First District Court of Appeal's March 3, 2010 Opinion in *Florida Power & Light Company, et al. v. Florida Public Service Commission,* Case No. 1D09-4779, and *Progress Energy Florida, Inc. et al. v. Florida Public Service Commission,* Case No. 1D09-5145.

   After some discussion, the Commissioners directed staff to seek further appellate review by filing a motion for rehearing, pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure or, alternatively, to ask for a review of this matter of great public importance to the Supreme Court by filing a motion for certification, pursuant to Rule 9.330(b), Florida Rules of Appellate Procedure, no later than March 18, 2010. Commissioners Edgar and Stevens dissented.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

4. Legislative Update.

   Staff briefed the Commissioners on Legislative matters of interest.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

5. Other matters, if any.

   Executive Director, Tim Devlin, announced the appointment of Marshall Willis as Director of the Division of Economic Regulation. The Commissioners unanimously confirmed the appointment.

   Commissioners participating: Argenziano, Edgar, Skop, Klement, Stevens

Attachment 2

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 29, 2010

TO: Timothy J. Devlin, Executive Director

FROM: Tom Ballinger, Utilities System/Engineering Spec Supervisor, Division of Regulatory Analysis
Robert L. Trapp, Assistant Director, Division of Regulatory Analysis
Cindy B. Miller, Senior Attorney, Office of the General Counsel

RE: FPSC Draft Comments in Response to Florida Power & Light's Petition for a Declaratory Order in FERC Docket No. EL-10-43
Critical Information: Please place on April 6, 2010 Internal Affairs: Comments are due April 9, 2010. Guidance is sought.

On February 17, 2010, Florida Power & Light Company (FPL) filed a Petition for Declaratory Order with the Federal Energy Regulatory Commission (FERC). FPL requested that the FERC clarify the scope of its jurisdiction over interconnection agreements between a public utility and a qualifying facility. The purpose of this Internal Affairs item is to seek guidance regarding FPSC participation in the FERC docket.

In the petition, FPL refers to the Public Utility Regulatory Policies Act of 1978 (PURPA). FPL states that under long-standing precedent regarding the jurisdiction of the FERC and state agencies under PURPA, the FERC should not exercise jurisdiction over an interconnection agreement between a public utility and a qualifying facility (QF) if the QF sells all its power to the public utility. However, a FERC 2007 decision appears to create a different policy for when QF interconnection agreements fall within the FERC's jurisdiction. FPL urges that the policy should be rescinded or FERC should only apply it on a going forward basis.

PURPA provides that state regulatory agencies are empowered to regulate the facilities and approve the contracts covered by PURPA. The law attempts to create a regulatory partnership between the FERC and state commissions by placing state commissions in the role of assisting in implementing the national policy. Under Section 292.301 of the FERC rules, the utilities are required to interconnect with the QFs. However, a state commission enforces the requirement. Thus, the state commission has jurisdiction over the interconnection arrangement.

The draft FPSC comments attached seek clarification from the FERC and agree with the FPL petition to the extent that FERC should confirm its long-standing precedent that it does not

exercise jurisdiction over interconnection agreements with QFs where the QF sells power only to the host utility. The comments request that FERC affirm the test that vests jurisdiction in the state agency when the utility purchases the QF's entire output. FERC should not claim jurisdiction over a part of this arrangement solely because the QF may sell to the non-host utility at some point in the future. Also, the comments urge that the FERC was essentially engaged in unlawful rulemaking when it issued the Niagara Mohawk decision, without following the rulemaking requirements in the Federal Administrative Procedure Act (APA). It appears the FERC has amended prior rulemakings without complying with the APA's notice and comment requirements. When the FERC took such action without following a generic approach, it offered no opportunity for monitoring and comment.

The deadline for intervention was March 19, 2010. Staff filed a Notice of Intervention on that date and requested that the FERC extend the comment deadline to April 9, 2010, in order for the FPSC to consider the matter at a noticed an open forum. The FERC granted the motion on March 25, 2010. There are a number of options that the FPSC may take.

Options

- The FPSC may choose to take no further action and may withdraw the Notice of Intervention.
- The FPSC may continue as an intervener for monitoring purposes and to retain a party status in case the FPSC wants to seek rehearing once the FERC releases a decision;
- The FPSC may file comments, such as those in the attachment.
- The FPSC may seek to file a separate petition for a declaratory order.

We recommend that the FPSC file the attached comments in the proceeding. (See Attachment A) The petition for a declaratory order already filed presents an opportunity to state the concerns.

Int. Aff. EL10-43

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light Company	)	Docket No. EL10-43-000

COMMENTS OF THE FLORIDA PUBLIC SERVICE COMMISSION IN SUPPORT OF FLORIDA POWER & LIGHT COMPANY'S PETITION FOR DECLARATORY ORDER

Pursuant to Rule 385.214 of the Federal Energy Regulatory Commission (Commission) rules, the Florida Public Service Commission (FPSC) filed a timely Notice of Intervention on March 19, 2010, in this proceeding. The FPSC hereby submits these comments requesting that the Commission clarify the scope of its jurisdiction over interconnection agreements between a public utility and a qualifying facility (QF) under the provisions of the Public Utility Regulatory Policy Act of 1978 (PURPA). In particular, the FPSC seeks clarification of the 2007 Niagara Mohawk Power Corp. d/b/a/ National Grid[1] case. Thus, these comments are filed in support of the Florida Power & Light petition regarding this policy issue.

Specifically, the FPSC takes exception to a finding in Niagara whereby the Commission stated "where a QF may sell any of its output to a third-party," the Commission has jurisdiction over the interconnection agreement (emphasis added).[2] This statement implies that, regardless of whether actual sales to a third-party occur, the very potential for making such sales would result in Commission regulation of the interconnection. If this interpretation remains in effect, it may render the FPSC's current rules governing interconnection between the utility and QF moot, which would have a chilling effect on the FPSC's efforts to encourage the development of renewable energy resources in Florida.

[1] 121 FERC ¶ 61,183 (2007)
[2] 121 FERC ¶ 61,183 at page 13.

Congress enacted PURPA to encourage conservation of energy and the efficient use of energy resources by promoting the development of cogeneration and small power producers in the private sector. To accomplish this, PURPA established three basic tenants requiring electric utilities to (1) interconnect with; (2) purchase from; and (3) make sales to qualifying cogenerators and small power producers (QFs). The capacity and energy purchased from QFs then became part of the electric utility's overall supply needed to serve retail electric customer demand. To facilitate the implementation of this new national energy policy, Congress empowered states with regulatory agencies, such as the FPSC, to regulate the purchase power contracts between state regulated public utilities and QFs, including interconnection.

Since its inception, Florida has embraced the provisions of PURPA. The Florida Legislature has adopted statutes requiring the FPSC to adopt rules that enhance the provisions of PURPA to encourage the development of cogeneration and renewable small power production in Florida. In 1981, the Florida Legislature enacted §366.05(9), Florida Statutes, (F.S.) authorizing the FPSC to establish guidelines for the purchase and sale of capacity and energy from any cogenerator or small power producer. In 1989, the statutes were broadened with the enactment of §366.051, F.S., which declares that: "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 grid of the state or consumed by a cogenerator or small power producer." The statute goes on to state that "the electric utility in whose service area a cogenerator or small power producer is located shall purchase, in accordance, with applicable law, all electricity offered for sale by such cogenerator or small power producer; or the cogenerator or small power producer may sell such electricity to any other electric utility in the state." (emphasis added) The statute requires that utility payments to QFs for the purchase of capacity and energy shall be at a rate equal to the

purchasing utility's full avoided cost. In essence, this long-standing act of the Florida Legislature extended the PURPA "obligation to purchase" to all public utilities in the state regardless of the location of the cogenerator or small power producer with payments equal to the purchasing utility's avoided cost.

In implementing the Florida Statutes, the FPSC has been careful to harmonize the requirements of both federal and state law. Pursuant to Rule 25-17.087, Florida Administrative Code (F.A.C.), each utility is required to interconnect with any QF within its service area. The interconnection standards established by this rule are consistent with FERC requirements. As mentioned above, once interconnected, the QF may elect to make sales either to its native utility or to a third party utility. Where sales to a third party utility are requested, Rule 25-17.0889, F.A.C., requires each electric utility in Florida to provide transmission service to wheel as-available energy or firm energy and capacity from the QF to the purchasing utility. The rates, terms, and conditions for such transmission services are those approved by the FERC.

In addition to the above, the Florida Legislature has enacted and the FPSC has implemented through rulemaking, numerous other provisions to encourage the development of renewable energy generating resources within Florida. In 2006, the Florida Legislature enacted §366.91, F.S., which requires investor-owned utilities to continuously offer purchase contracts (standard offer contracts) to producers of renewable energy. Pending legislation, first initiated in 2008 and continuing in the 2010 Legislative Session, may establish additional requirements for Florida's electric utilities to include a certain percentage of renewable energy as part of their overall energy supply.

In Niagara, the Commission stated that "where a QF may sell any of its output to a third-party," the Commission has jurisdiction over the interconnection agreement.[3] (emphasis added) This statement implies that, regardless of whether actual sales to a third-party occur, the very potential for making such sales would result in the Commission regulation of the interconnection. Since Florida has opened the statewide grid to non-utility renewable energy suppliers, it follows that each qualified cogenerator and small power producer has the potential to make sales to an electric utility other than the native utility to which it must interconnect. If this interpretation stands, it may render the FPSC's current rules governing interconnection moot. Qualifying facilities would be forced to seek and adjudicate interconnection agreements from the Commission; while the rates, terms, and conditions of purchased power contracts would remain under state purview. Such bifurcation would do little to facilitate the FPSC's and the Commission's efforts to encourage the development of renewable energy resources in Florida.

Further, the FPSC believes that the Commission may have violated the Federal Administrative Procedure Act (APA) when it changed policies, previously adopted by rulemaking, in the Niagara case. "Rule" is defined in the APA as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.[4] A "rulemaking" is an agency process for formulating, amending, or repealing a rule.[5] The section on rulemaking in the APA requires that the agency provide a notice of proposed rulemaking and that interested persons be given an opportunity to participate in the rulemaking through submission of written data, views or arguments.[6] These

[3] 121 FERC ¶ 61,183 at page 13.
[4] 5 U.S.C. Sec. 551 (4)
[5] 5 U.S.C. Sec. 551 (5)
[6] 5 U.S.C. Sec. 553

generic notice and comment requirements were not followed in the Niagara case. Interested persons could not discern that such a policy shift was occurring in that utility-specific case.

Conclusion

For the foregoing reasons, the FPSC respectfully requests that the Commission clarify the language in the Niagara case to no longer imply that jurisdiction shifts to the Commission when a QF "may" sell to the non-host utility in the future. In the alternative, the FPSC requests that the Commission open a full "notice and comment" rulemaking so that interested persons, such as state commissions, are able to participate in the proceeding.

Attachment 3

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 31, 2010

TO: Timothy J. Devlin, Executive Director

FROM: Cindy B. Miller, Senior Attorney, Office of the General Counsel
Samantha M. Cibula, Attorney Supervisor, Office of the General Counsel
Robert L. Trapp, Assistant Director, Division of Regulatory Analysis
Judy Harlow, Senior Analyst, Division of Regulatory Analysis

RE: Nuclear Waste Litigation at the Nuclear Regulatory Commission

CRITICAL INFORMATION: Please place on April 6 Internal Affairs; Guidance is sought.

The purpose of this Internal Affairs item is to seek guidance regarding litigation on the Yucca Mountain repository.

History

The Nuclear Waste Policy Act (NWPA) was enacted in 1982, and made the federal government responsible for safe disposal of high-level radioactive waste, including spent nuclear fuel. Under the NWPA, utilities pay for the eventual disposal of commercial nuclear waste through the Nuclear Waste Fund, which is, in turn, passed through to ratepayers.

Since the NWPA was enacted in 1982, ratepayers, along with reactor owners, have paid more than $17 billion into the fund (Florida ratepayers have paid $787.6 million into the fund), in part, to cover the costs associated with the yet-to-be provided federal waste disposal repository.

The Department of Energy (DOE) was obligated to take the waste beginning no later than January 31, 1998. It has not done so. The Nuclear Regulatory Commission received an application from the Department of Energy on June 3, 2008, for a license to construct and operate the nation's first geologic repository for high-level nuclear waste at Yucca Mountain, Nev. Now DOE seeks to withdraw its application to license the repository, with prejudice, while continuing to collect the fees.

Ratepayers across the country continue to pay for a national storage, enhanced litigation costs, and the documented increased costs of interim storage. Dismissal of the Yucca Mountain application may diminish the government's ability to fulfill its outstanding obligation to take possession and dispose of the nation's spent nuclear fuel and high level nuclear waste. According

to the National Association of Regulatory Utility Commissioners (NARUC), if the DOE motion is successful, it will effectively delay DOE's ability to begin to accept waste for at least 25 years.

As indicated above, Florida's electric ratepayers have paid $787.6 million to the Nuclear Waste Fund, according to NEI information. The federal liability for these contributions totals approximately $1.4 billion, when interest is taken into consideration. In 2009, FPL's ratepayers contributed $21,354,871 to the Nuclear Waste Fund, while Progress Energy's ratepayers contributed $4,657,191. Utility contributions to the fund are assessed based on a fee of approximately $1 per megawatt-hour of energy produced by a utility's nuclear generation facilities. The FPSC was involved in litigation, along with other state commissions, against DOE in the mid-1990s.

The NRC Proceeding

The Department of Energy filed on March 3, 2010, a motion with the NRC to withdraw with prejudice the license application for the Yucca Mountain nuclear waste repository. NARUC has already filed a petition to intervene at the NRC to express concern.

If the withdrawal is approved, this would be contrary to the mandated duties in the Nuclear Waste Policy Act. According to the NARUC petition, the withdrawal "with prejudice," if granted, would waste decades of ratepayer-funded research. "It also exacerbates NARUC's member commission's ability to carry out their fiduciary responsibilities to protect the health, safety, and economic welfare of its State electric ratepayers." It is our understanding that "with prejudice" means that DOE could never return to Yucca Mountain as a potential storage site.

Options in the NRC Proceeding

(1) Join with Possible Other States in Petition to Intervene.

Don Kesky – who spearheaded states' efforts in the past regarding DOE's noncompliance with the Nuclear Waste Policy Act – is seeking to coordinate a petition by a number of states. It will involve some contribution from the states, which would be capped at $1500 from each state for each phase of the proceeding (the intervention, the brief, the oral argument). Thus, the total cost would be capped at $4,500. Mr. Kesky also represents the Prairie Island Indian Community in this proceeding.

The FPSC was contacted by Mr. Kesky and asked whether the FPSC would like to sign on as a signatory to the draft petition, which Mr. Kesky has prepared. Mr. Kesky believes that several states filing an additional intervention may "broaden the concerns and add to the strength of the message." Pursuant to a call to Mr. Kesky on March 30, 2010, the petition of the states for intervention will be filed after April 6, 2010. Originally, he had stated that the petition would be due March 15; the deadline is unclear because this is a continuation of a proceeding that began in 2008.

(2) Rely on NARUC to Represent the FPSC's Interests in the Proceeding.

As stated above, NARUC has filed a petition to intervene in the proceeding. While there is some concern that NARUC may not have standing to intervene, the DOE is not contesting NARUC's standing in the case. Under this option, FPSC staff would work with NARUC on the filings.

(3) Submit a Written Limited Appearance Statement.

Pursuant to NRC rules, interested persons may, at the discretion of the presiding officer, submit a written limited appearance statement of his or her position on the issues in the proceeding. In such a statement, the FPSC could oppose the DOE's withdrawal of the application for the Yucca Mountain repository and could oppose the withdrawal of the application "with prejudice." The FPSC would not be a party under this option. There is no deadline on this submission.

(4) Submit an Amicus Brief.

Once the briefing schedule is established, the FPSC could request permission to submit an amicus brief. Under this option, the FPSC would not be a party to the proceeding. It would be at the presiding officer's discretion whether to allow the brief.

Staff recommends that the Commission choose Option 2. However, staff also seeks the Commission's permission to submit a limited appearance statement, as set forth in Option 3, and to take any other steps in the future at the NRC, short of becoming a party in the proceeding, which staff deems necessary to protect the ratepayers' interests.

II. Outside Persons Who Wish to Address the Commission at Internal Affairs

The records reflect that no outside persons addressed the Commission at this Internal Affairs meeting.

III. Supplemental Materials Provided During Internal Affairs

The records reflect that there were no supplemental materials provided to the Commission during this Internal Affairs meeting.