

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: September 22, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Bellak)
Division of Economic Regulation (Haff)

RE: Docket No. 040863-EU – Petition for declaratory statement regarding application of Rule 25-17.0836, F.A.C., Modification to Existing Contracts; Explanation of When Approval is Required, to its circumstances, by Indiantown Cogeneration L.P.

AGENDA: 10/05/04 – Regular Agenda – Decision on Declaratory Statement – Parties May Participate at the Commission's Discretion

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040863.RCM.DOC

Case Background

On August 16, 2004, Indiantown Cogeneration, L.P. (ICL) filed a petition for declaratory statement (petition). Therein, ICL noted that its coal-fired cogeneration facility in Indiantown, Florida sells capacity and energy to Florida Power & Light Company (FPL) pursuant to a Commission-approved power purchase agreement (PPA), which included a “fuel index”. While the fuel index incorporated data based on the cost of Appalachian Coal purchased by and delivered to the St. Johns River Power Park (SJRPP), the Second Amendment to the PPA, approved by the Commission in Order No. PSC-92-1345-FOF-EI, provided for the parties to agree to a comparable replacement index in the event of a long-term interruption in or permanent cancellation of delivery of coal to SJRPP.

Since during January 2003, SJRPP ceased purchasing Appalachian Coal, the parties to the PPA have agreed on a Replacement Index based on publicly reported delivered coal cost information for utilities and municipalities in Florida that utilize Appalachian Coal.

Pursuant to Rule 25-17.0836, FPL provided staff a copy of the Letter Agreement containing the Replacement Index, noting that it did not constitute a material change in the PPA since it was explicitly contemplated by the Second Amended PPA approved by the Commission.¹

ICL notes in its Petition that Paragraph 19-4 of the PPA places on ICL the risk of disallowance of any energy payments calculated, which would involve application of the Replacement Index. Accordingly, ICL must certify to its financing entities that no Commission approval of the Letter Agreement by the Commission is necessary for cost recovery. ICL argues that the Commission should so state based on Rule 25-17.0836(3):

Commission approval is not required for modifications explicitly contemplated by the terms of the contract....

ICL further notes that such a declaration is necessary in view of Rule 25-17.0836(7), which states:

On its own motion, the Commission may review a contract modification to determine whether the modification requires approval.

ICL represents that FPL supports issuance of the statement petitioned for by ICL.

¹ The Letter Agreement provides for the SJRPP based index to again govern if SJRPP begins taking deliveries of Appalachian Coal exceeding a threshold quantity.

Discussion of Issues

Issue 1: Should the Commission issue the declaratory statement sought by ICL concerning the facts presented?

Recommendation: Yes. The Commission should issue a declaratory statement that the Letter Agreement containing the Replacement Index devised by FPL and ICL is not subject to the requirements of formal approval to assure cost recovery.

Staff Analysis: Pursuant to Section 120.565, Florida Statutes, a substantially affected person may seek an agency's opinion as to the applicability of any rule or order as it applies to the particular set of circumstances of that person. Here, the choice offered by Rule 25-17.0836, F.A.C. between subsections (3) of the rule (Commission approval not required for modifications explicitly contemplated by contract terms) and (7) (Commission may review contract modification to determine whether it requires approval), creates some uncertainty as to whether, in view of the Replacement Index modification, ICL can represent to its financing entities that all approvals for cost recovery have been obtained.

In this instance, staff believes it to be non-controversial that the modification should be governed by Rule 25-17.0836(3). Therefore, staff recommends that the Commission issue the requested declaratory statement in order to resolve any potential uncertainty.

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Issue 2: Should this docket be closed?

Recommendation: Yes. The docket should be closed upon issuance of the order.

Staff Analysis: If the Commission votes to issue a declaratory statement and the order is issued, the docket may be closed.