

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-

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**DATE:** February 21, 2008

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Economic Regulation (Ballinger, Baxter, Brown, Maurey)  
Office of the General Counsel (Brubaker, Hartman)

**RE:** 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:** 03/04/08 – Regular Agenda – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Argenziano

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\070234.RCM.DOC

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### Case Background

In 2005, the Florida Legislature enacted Section 366.91, Florida Statutes (F.S.), regarding renewable energy. Section 366.91(3), F.S., enumerates requirements to promote the development of renewable energy resources, including requiring that this Commission establish

requirements relating to the purchase of capacity and energy by public utilities from renewable energy producers and allows the Commission to adopt rules to administer this section.

The Commission adopted amendments to Rules 25-17.0832 and 25-17.200 – 17.310, Florida Administrative Code (F.A.C.), 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-EQ (Gulf), 070234-EQ (FPL), 070235-EQ (PEF), and 070236-EQ (TECO) were opened to address each Petition. On June 11, 2007, the Commission issued by proposed agency action (PAA) 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) jointly filed a Motion for More Definite Statement or, in the Alternative, Motion to 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. On September 5, 2007, the Commission granted the IOUs' Alternative Motions to Dismiss without prejudice, finding that the Petitions failed to meet the pleading requirements contained in Rule 28-106.201, F.A.C. The Commission allowed FICA to file an amended petition within 10 days. FICA filed amended petitions with respect to Docket Nos. 070234-EQ, 070235-EQ, and 070236-EQ. FICA did not file an amended petition in Docket 070232-EI (Gulf). Accordingly, Consummating Order No. PSC-07-0724-CO-EQ was issued on November 19, 2007, and Docket 070232-EI was closed.

By Order No. PSC-07-0962-PCO-EQ, issued December 3, 2007, Docket Nos. 070234-EQ, 070235-EQ, and 070236-EQ were consolidated and controlling dates were established for hearing. The City of Tampa was granted intervention in the consolidated dockets by Order No. PSC-07-1013-PCO-EQ, issued December 21, 2007. The Solid Waste Authority of Palm Beach County (SWA) was granted intervention in the consolidated dockets by Order No. PSC-08-0020-PCO-EQ, issued January 7, 2008.

On January 11, 2008, FICA filed a Notice of Withdrawal of its protest with respect to Docket No. 070236-EQ, and the City of Tampa and SWA each filed a Notice of Withdrawal as a Formal Party with respect to that docket.

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This recommendation addresses FICA's Notice of Withdrawal of its protest, and the ultimate disposition of Order No. PSC-07-0494-TRF-EQ and Docket No. 070236-EQ. The Commission has jurisdiction over this matter pursuant to Sections 366.04 through 366.06 and 366.91, F.S.

### **Discussion of Issues**

**Issue 1:** Should the Commission dismiss FICA's protest of PAA Order No. PSC-07-0494-TRF-EQ?

**Recommendation:** Yes, the Commission should dismiss FICA's protest of PAA Order No. PSC-07-0494-TRF-EQ. Order No. PSC-07-0494-TRF-EQ approving TECO's standard offer contract and associated tariffs should be revived, deemed final and effective, and Docket No. 070236-EQ should be closed. (Brubaker)

### **Staff Analysis:**

On January 11, 2008, FICA filed a Notice of Withdrawal of its protest, and the City of Tampa and SWA each filed a Notice of Withdrawal as a Formal Party. The question remains whether the withdrawal of the protest revives Order No. PSC-07-0494-TRF-EQ, or whether a new PAA must be issued.

FICA was the only substantially affected person to file a protest to Order No. PSC-07-0494-TRF-EQ. Any affected person had a clear point of entry and an opportunity to request a hearing at the time Order No. PSC-07-0494-TRF-EQ was issued and during the ensuing protest period. By failing to timely protest, other persons have waived the right to a hearing. Where persons have not availed themselves of a clear point of entry, they must be considered to have waived their rights to a hearing. Florida Medical Center v. Dept. of H.R.S., 484 So. 2d 1292 (Fla. 1<sup>st</sup> DCA 1986); NME Hospitals, Inc. v. Dept. of H.R.S., 494 So.2d 379 (Fla. 1<sup>st</sup> DCA 1985).

The proposed agency action process was developed for judicial economy as a mechanism to avoid numerous hearings. It is within the Commission's discretion to set aside the PAA process and to conduct a formal hearing on its own motion. However, staff does not recommend that a formal hearing should be held in this instance. Staff believes that the Commission has already thoroughly reviewed, and the full Commission voted to approve, TECO's standard offer contract and associated tariffs. Thus, by dismissing FICA's protest, reviving Order No. PSC-07-0494-TRF-EQ approving TECO's standard offer contract and associated tariffs, deeming the order final and effective, and closing Docket No. 070236-EQ, no party's rights would be violated. Staff's recommendation herein is consistent with past Commission practice.<sup>1</sup>

Staff notes that even if SWA and the City of Tampa had not withdrawn as intervenors to Docket No. 070236-EQ, Rule 25-22.039, F.A.C., provides that intervenors take the case as they find it.<sup>2</sup>

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<sup>1</sup> See Order No. PSC-93-0450-FOF-EU, issued March 25, 1993, in Docket No. 920202-EI, In re: Petition for approval of a territorial agreement between Clay Electric Cooperative, Inc. and Jacksonville Electric Authority in Clay and Duval Counties; Order No. PSC-93-0339-FOF-EG, issued March 4, 1993, in Docket No. 921034-EG, In re: Petition of Florida Power and Light Company for approval of the New Home Construction.

<sup>2</sup> See Order No. PSC-03-0397-FOF-SU, issued March 21, 2003, in Docket No. 020413-SU, In re: Initiation of show cause proceedings against Aloha Utilities, Inc. in Pasco County for failure to charge approved service availability charges, in violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.

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**Issue 2:** Should the docket be closed?

**Recommendation:** Yes. If the Commission approves staff's recommendation in Issue 1, Docket No. 070236-EQ should be closed. Docket Nos. 070234-EQ and 070235-EQ should remain open to address the protests filed as to those dockets. (Brubaker)

**Staff Analysis:** If the Commission approves staff's recommendation in Issue 1, Docket No. 070236-EQ should be closed. Docket Nos. 070234-EQ and 070235-EQ should remain open to address the protests which have been filed as to those dockets.