

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 6, 2008

TO: Office of Commission Clerk (Cole)

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

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.

AGENDA: 03/18/08 – 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\GCL\WP\070234.RCM.DOC

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 25, 2008, Wheelabrator Technologies, Inc. (Wheelabrator), filed a petition to intervene in Docket No. 070234-EQ, which is currently pending.

On February 18, 2008, FICA filed a Notice of Withdrawal of its protest with respect to Docket No. 070234-EQ, and the City of Tampa and SWA each filed a Notice of Withdrawal as a Formal Party with respect to that docket.¹

On February 15, 2008, Wheelabrator filed a Motion to hold Docket No. 070234-EQ in abeyance, and toll all deadlines, including the requirements for prefiled testimony, discovery responses, and the evidentiary hearing; and that all activities, including the hearing, be rescheduled to follow the filing of FPL's new standard offer contract on April 1, 2008. On February 21, 2008, FPL filed a response to Wheelabrator's Motion for Abeyance, arguing that the withdrawal of the only protest in Docket No. 070234-EQ should result in Order No. PSC-07-0492-TRF-EQ being made final and effective, the hearing in Docket No. 070234-EQ should be cancelled, and the docket should be closed.

This recommendation addresses FICA's Notice of Withdrawal of its protest, Wheelabrator's Petition to Intervene and Motion for Abeyance, and the appropriate disposition of Order No. PSC-07-0492-TRF-EQ approving FPL's standard offer contract and associated tariffs. The Commission has jurisdiction over this matter pursuant to Sections 366.04 through 366.06 and 366.91, F.S.

¹ FICA also withdrew its petition with respect to Docket No. 070236-EQ (TECO). At the March 4, 2008, Agenda Conference, the Commission voted to dismiss FICA's protest of PAA Order No. PSC-07-0494-TRF-EQ, revive and deem final and effective Order No. PSC-07-0494-TRF-EQ approving TECO's standard offer contract and associated tariffs, and close Docket No. 070236-EQ. The Order memorializing the Commission's decision is scheduled to issue on March 24, 2008.

Discussion of Issues

Issue 1: Should the Commission dismiss FICA's protest of PAA Order No. PSC-07-0492-TRF-EQ?

Recommendation: Yes, the Commission should dismiss FICA's protest of PAA Order No. PSC-07-0492-TRF-EQ. Order No. PSC-07-0492-TRF-EQ approving FPL's standard offer contract and associated tariffs should be revived, deemed final and effective, and Docket No. 070234-EQ should be closed. Consistent with Rule 25-22.039, F.A.C., and past Commission practice, by virtue of the protest withdrawal, Wheelabrator's Petition to Intervene and Motion to hold Docket No. 070234-EQ in abeyance should be deemed moot, and therefore need not be ruled upon. (Brubaker)

Staff Analysis: On February 18, 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-07-0492-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-07-0492-TRF-EQ. Any affected person had a clear point of entry and an opportunity to request a hearing at the time Order No. PSC-07-0492-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. 1st DCA 1986); NME Hospitals, Inc. v. Dept. of H.R.S., 494 So.2d 379 (Fla. 1st 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, FPL's standard offer contract and associated tariffs. Thus, by dismissing FICA's protest, reviving Order No. PSC-07-0492-TRF-EQ approving FPL's standard offer contract and associated tariffs, deeming the order final and effective, and closing Docket No. 070234-EQ, no party's rights would be violated. Staff's recommendation herein is consistent with past Commission practice.²

Wheelabrator has not withdrawn its request for intervention in Docket No. 070234-EQ, and as discussed previously, on February 15, 2008, it filed a Motion to hold Docket No. 070234-EQ in abeyance, requesting that all prehearing and hearing activities be tolled and rescheduled to follow the April 1, 2008, filing of FPL's new standard offer contract.

² 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.

In its response in opposition, FPL argues that, with the withdrawal of the sole protest to Order No. PSC-07-0492-TRF-EQ, the hearing in Docket No. 070234-EQ should be cancelled and the Order should be made final and effective. Because there is no longer any protest to Order No. PSC-07-0492-TRF-EQ, FPL contends that there is no proceeding to abate; therefore, Wheelabrator's Petition to Intervene and Motion to hold the docket in abeyance are moot.

Rule 25-22.039, F.A.C., specifically provides that "intervenors take the case as they find it." Consistent with the Rule and past Commission practice,³ by virtue of the protest withdrawal, Wheelabrator's Petition to Intervene and Motion to hold Docket No. 070234-EQ in abeyance should be deemed moot, and therefore need not be ruled upon. Because Wheelabrator did not protest Order No. PSC-07-0492-TRF-EQ, it cannot maintain the proceeding.

³ 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.

Docket No. 070234-EQ

Date: March 6, 2008

Issue 2: Should the docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, Docket No. 070234-EQ should be closed. Docket No. 070235-EQ should remain open to address the protest which has been filed as to that docket. (Brubaker)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, Docket No. 070234-EQ should be closed. Docket No. 070235-EQ should remain open to address the protest which has been filed as to that docket.