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COGENERATION & ALTERNATIVE ENERGY  
ENERGY REGULATORY LAW

**VIA FEDERAL EXPRESS**

March 16, 1999

Ms. Blanca S. Bayó, Director  
Division of Records & Reporting  
Florida Public Service Commission  
Capitol Circle Office Center  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399

In Re: **FPSC Docket No.990172-EI**  
Petition by Gulf Power Company for waiver of Rule 25-17.0832(4), F.A.C.  
which sets forth requirements for filing of a standard offer contract.

Dear Ms. Bayó:

Enclosed for filing in the above Docket please find an original and 7 copies of Preliminary Comments of The Florida Industrial Cogeneration Association. Also enclosed is a double-sided high density 3.5 inch floppy disk containing this document in WordPerfect 6.0 format as prepared on a Windows-based computer.

- ACK \_\_\_\_\_
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- APP \_\_\_\_\_
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- LIN \_\_\_\_\_
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- SEC Enclosures
- WFS \_\_\_\_\_
- OTH *orig. Hong*

If you have any questions regarding this filing, please do not hesitate to call.

Sincerely,

*Richard A. Zambo*  
Richard A. Zambo

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*Done 3/24/99*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Gulf Power Company )  
for waiver of Rule 25-17.0832(4), F.A.C. )  
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Docket No.990172-EI

Submitted for filing:  
March 16, 1999

**PRELIMINARY COMMENTS**  
**OF**  
**THE FLORIDA INDUSTRIAL COGENERATION ASSOCIATION**

The Florida Industrial Cogeneration Association (FICA), through its undersigned attorney, and pursuant to Florida Administrative Weekly notice of March 5, 1999 submits these preliminary comments in opposition to the rule waiver sought by Gulf Power Company.

1. Gulf Power Company (Gulf) seeks a waiver of Rule 25-17.0832(4), F.A.C., alleging that application of the rule "... would create a substantial hardship or violate principles of fairness." Gulf seeks waiver of rule provisions which require that: "... *each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities.*"

2. Under the referenced rule, standard offers are only made available to small qualifying facilities (SQF), which represent a fairly limited amount of non-utility generation.<sup>1</sup> SQFs are the types of facilities this Commission specifically sought to encourage when it last

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<sup>1</sup> Gulf proposes to construct a 532 mW combined cycle power plant expected to be in service June, 2002. Although SQFs may not provide the entire 532 mWs of the proposed unit, under the Commission's rules SQF's are paid based on the value of "deferring" an avoided unit, so that any capacity commitments from SQFs will avoid a proposed unit with a defined in-service date. For example, 50 mWs of SQF capacity may move Gulf's need for capacity out 6 months in time, resulting in essentially a "new" avoided unit. Thus, value of deferral payments provided by rule accounts for and accommodates SQF capacity which may be less than the proposed avoided unit. Moreover, value of deferral benefits utility customers by virtue of an inverted capacity payment stream which lowers costs in early years, and reduces inter-generational inequities which can result when a utility constructs more capacity than is necessary in the immediate future.

revised its rules to significantly restrict access to standard offers. If Gulf's request is granted, it would foreclose SQFs from access to the standard offer, contrary to state and federal law.

3. FICA members own and/or operate small qualifying facilities (SQF) which generate electricity in conjunction with their industrial operations at various locations in Florida. FICA members sell electricity to Florida electric utilities.

4. Rule 25-17.0832(4), F.A.C. cited by Gulf specifies the procedures to be used by a utility in filing standard offer tariffs and contracts for Commission approval. However, Rule 25-17.082(1), F.A.C. places an affirmative duty on Gulf and other utilities to ". . . file a tariff or tariffs and a standard offer contract or contracts for the purchase of energy and capacity for qualifying facilities which reflects the provisions set forth in these rules."

5. Gulf's request for waiver falls short of the requirement of Chapter 120.542 (2), F.S. which requires a demonstration that: "*the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.*"<sup>2</sup> Gulf has not identified specific facts sufficient to justify a waiver, and has not demonstrated why the waiver requested would serve the purposes of the underlying statute.<sup>3</sup>

6. The "underlying statute[s]", cited by the Commission in adopting the subject rules are Chapter 366.051, F.S. - relating to cogeneration and small power production - and Chapter 403.503, F.S. - relating to the Florida Electric Power Plant Siting Act (PPSA or Act).

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<sup>2</sup> Chapter 120.542 (2), F.S. further states: "For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule."

<sup>3</sup> Chapter 120.542 (5), F.S. provides: "A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify: (a) The rule from which a variance or waiver is requested. (b) The type of action requested. (c) The specific facts that would justify a waiver or variance for the petitioner. (d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute." (E.S.)

7. Chapter 366.051, F.S., is specifically designed to encourage cogeneration and small power production.<sup>4</sup> It is difficult to discern how the purposes of that statute will be achieved if Gulf does not file a standard offer based on its full avoided cost - which in this case would be the cost of its next scheduled generating unit.

8. Chapter 403.503, F.S. is part of the PPSA permitting process designed to balance the need for new power plants with environmental impacts. Within the PPSA, the Commission is defined as the exclusive forum for determining "need" for those electrical power plants subject to the Act. In evaluating requests by applicants for determination of need, the Commission is obligated to consider, among other things, ". . . *whether the proposed power plant is the most cost-effective alternative available.*"<sup>5</sup> It is difficult to discern how the purposes of that statute will be achieved if Gulf does not file a standard offer based on its full avoided cost - which in this case would be the cost of the "proposed power plant". Unless

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<sup>4</sup> That section provides in part 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 electric grid of the state or consumed by a cogenerator or small power producer. 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. The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer." In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs. A utility's "full avoided costs" are the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source. (Emphasis supplied)

<sup>5</sup> 403.519 Exclusive forum for determination of need - On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. The commission shall publish a notice of the proceeding in a newspaper of general circulation in each county in which the proposed electrical power plant will be located. The notice shall be at least one-quarter of a page and published at least 45 days prior to the scheduled date for the proceeding. The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report required by s. 403.507(2)(a)2. An order entered pursuant to this section constitutes final agency action. (Emphasis Supplied)

SQFs are given an opportunity to respond to a standard offer, Gulf will be constrained in its ability to argue that the proposed plant is the most cost effective alternative.<sup>6</sup>

9. Gulf has not affirmatively demonstrated that application of the rule ". . .affects a particular person [Gulf] in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule." as is required by Chapter 120.542, F.S. If Gulf's waiver were granted on the basis of its vague allegations, any utility subject to the rule could obtain a waiver by simply alleging that time constraints prevented it from publishing a standard offer. Such precedent would render the standard offer rules virtually meaningless.

10. Gulf states that there was insufficient time in its planning schedule to both open a solicitation period for a standard offer, and issue an RFP for the 2002 combined cycle unit. FICA notes that over 2 months passed between Gulf's amendment to its 1998 TYSP, and its issuance of the RFP - a two month period in which a solicitation period could have been opened. FICA would also note that Rule 25-17.0832(4)(e)(5)<sup>7</sup> does not appear to specifically prohibit an open solicitation period following the conclusion of the RFP process - an option which would be available to Gulf.

11. Granting the waiver sought by Gulf would deny SQFs the opportunity to provide electric generating capacity to Gulf. Such a result would be contrary to both Florida and Federal law which favors QFs as an alternative to the construction of generating capacity by electric utilities. Likewise, granting the waiver would be a departure from longstanding, well

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<sup>6</sup> It could be argued that SQFs could have simply participated in the bidding process. However, one of the factors leading the Commission to retain standard offer tariffs and contracts for SQF's was the understanding that SQFs were not likely to participate in costly, expensive and uncertain bidding processes which are typically dominated by large independent power producers, or developers of large merchant plants. The standard offer process provides an incentive for these desirable alternatives to new power plants to offer their energy and capacity for sale.

<sup>7</sup> That rule reads as follows: "A reasonable open solicitation period during which time the utility will accept proposals for standard offer contracts. Prior to the issuance of timely notice of a Request for Proposals (RFP) pursuant to Rule 25-22.082(3), the utility shall end the open solicitation period;"

established policies of this Commission to encourage efficient, cost-effective alternatives to utility construction of new power plants.

12. FICA is concerned with Gulf's petition for a number of reasons, including what appears to be an ongoing effort to avoid purchasing firm capacity from either SQFs under the standard offer rules<sup>8</sup>, or from other suppliers under the bidding rules. Such a conclusion can be reached based on information contained in Gulf's filings in Docket Nos. 980783-EI (June, 1998); 981346-EQ (October 1998); and, this proceeding - 990172-EI (February 11, 1998).

- (a) On or about September 1, 1997 Gulf began an evaluation of its generation plans;
- (b) On or about April 1, 1998, Gulf filed its TYSP;
- (c) On or about June 1, 1998, Gulf filed revisions to its TYSP;
- (d) June 23, 1998 Gulf filed a petition seeking waiver of the Bidding Rules alleging insufficient time to comply with the rules and construct the unit in a timely fashion;
- (e) August 21, 1998 Gulf issued an RFP for a 2002 combined cycle power plant;
- (f) September 9, 1998 the Commission issued order denying request for waiver of the bidding rules;
- (g) October 4, 1998 Gulf petitioned for approval of a standard offer based on 2006 avoided unit;
- (h) On or about November, 1998, after issuance of staff recommendation to deny standard offer based on 2006 avoided unit, Gulf withdrew standard offer based on the 2006 unit;
- (i) February 12, 1999 Gulf filed petition seeking waiver of standard offer rule.

13. Gulf states that it will soon be filing a request for "need determination" associated with the proposed 2002 unit, as part of the power plant siting act certification

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<sup>8</sup> There appear to have been, and there remain, ample opportunities for Gulf to issue a standard offer tariff and contract based on the 2002 combined cycle unit.

requirement. Failure to publish a standard offer tariff and contract based on the 2002 avoided unit will significantly impact upon Gulf's ability to adequately demonstrate that the proposed facility is the most cost-effective alternative available. (See paragraph 8, above) Moreover, SQFs which were not afforded an opportunity to respond to a standard offer based on that unit would likely be entitled to a point of entry in any "need determination" proceedings before the Commission in connection with the proposed 2002 unit.

14. Gulf argues that timing is so critical that it should be excused from its obligations under the standard offer rules, yet the description of its planning process is inconsistent with that argument. For example, in the affidavit appended to its petition, Gulf states that its ". . . *planning process utilizes an annual cycle that coincides with the calendar year. Gulf's annual Ten Year Site Plan (TYSP) was filed in April 1998. As a result of adding a 'planned unit', Gulf filed a revised 1998 TYSP in June 1998.*" FICA observes that this does not appear to coincide with either a calendar year or a TYSP filing cycle. Gulf further states that "*The new 'planned unit' was the result of extensive evaluations that had been conducted during the eight months prior to the April 1998 TYSP. These evaluations were supplemental to the normal planning process . . .*" By its own description, Gulf's planning process appears to be sufficiently flexible that it need not adhere to strict time constraints. Certainly Gulf's schedule can accommodate a modest time period for standard offer solicitations based on the 2002 avoided unit.

15. Gulf's petition is currently scheduled for the March 30th Agenda with a PAA Order due on April 19th. Moreover, should the Commission grant the requested waiver, affected parties such as FICA will be provided an opportunity to object and/or request a hearing on the issues presented. Accordingly, any of the time savings which Gulf associates with the granting of the waiver may be illusory.