

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power
& Light Company for approval of
standard offer contract.

DOCKET NO. 000868-EI
ORDER NO. PSC-00-1748-PAA-EI
ISSUED: September 26, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.
LILA A. JABER
BRAULIO L. BAEZ

NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING PETITION FOR STANDARD OFFER CONTRACT
AND GRANTING VARIANCE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose substantial interests are affected files a petition for a formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code.

I. CASE BACKGROUND

On July 17, 2000, Florida Power & Light Company (FPL) filed a Petition for Approval of a Standard Offer Contract (Petition) for qualifying cogeneration and small power production facilities (QFs). The proposed contract is based on a 5 megawatt (MW) subscription limit of a 165 MW combustion turbine generating unit with an in-service date of January 1, 2002.

FPL also filed a Petition for a Variance from Rule 25-17.0832(4)(e), Florida Administrative Code (Petition for Variance). FPL seeks a variance from the 10 year minimum contract term required by the rule, and instead proposes the contract be limited to a term of five years. Pursuant to Section 120.542(6), Florida Statutes, notice of FPL's petition was submitted to the Secretary of State for publication in the August 11, 2000, Florida

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Administrative Weekly. No comments on the Petition for Variance were filed. The 14-day comment period provided for variances by Rule 28-104.003, Florida Administrative Code, expired on August 25, 2000.

In this Order we rule on both the petition for approval of the proposed standard offer contract and the requested rule variance. We are vested with jurisdiction over this matter through several provisions of Chapter 366, Florida Statutes, including Sections 366.04, 366.05, 366.051, 366.06, and 366.80-.82, Florida Statutes. We are vested with jurisdiction to address FPL's Petition for Variance through Section 120.542, Florida Statutes.

II. VARIANCE

The variance shall be granted because FPL has demonstrated that the purpose of the statute underlying the rule from which it seeks a variance will be met, and that FPL and its ratepayers will suffer substantial hardship if the variance is not granted.

A. Standard for Approval

Section 120.542, Florida Statutes (1999), mandates threshold proofs and notice provisions for variances and waivers from agency rules. Subsection (2) of the statute states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. 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 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.

Thus, under the statute, a person requesting a variance or waiver must affirmatively demonstrate that the purpose of the underlying statute has been met. In addition, the petitioner must demonstrate that it will either suffer "substantial hardship" or that "principles of fairness" will be violated. If the allegations relate to fairness, an additional proof of uniqueness to the petitioner is required by the statute.

B. FPL's Petition For Variance

The variance requested by FPL is for a standard offer contract term limited to five years instead of the ten year minimum contract term required by Rule 25-17.0832(4)(e), Florida Administrative Code.

1. Purpose of the Underlying Statute

In its Petition For Variance, FPL identifies the underlying statute implemented by the rule as Section 366.051, Florida Statutes. According to FPL, the purposes of the statute, and the purposes of the Public Utility Regulatory Policies Act of 1978 (PURPA), are to promote the growth of alternative generating facilities, with the express limitation that electric customers should not pay more for power than they otherwise would.

FPL states that its Petition For Variance will meet the purpose of the statute. FPL asserts that the standard offer contract will provide an economic incentive for the development of the type of projects contemplated by the statute. FPL further asserts that the variance requested is more likely to ensure that electric customers do not pay excessive costs for power purchased under the standard offer contract.

2. Substantial Hardship

FPL states that the standard offer contract will not defer or avoid the construction of additional generating capacity. FPL asserts that its customers are prejudiced to the extent they are required to make capacity payments where no generation is avoided or deferred. FPL states that to require capacity payments in such instance for a ten-year period, would result in a substantial risk and hardship.

C. Analysis

1. Purpose Of The Underlying Statute

The purpose of Section 366.051, Florida Statutes, to encourage cogeneration and small power production, is express: "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...." Rule 25-17.0832(4), Florida Administrative Code, implements Section 366.051, Florida Statutes. Pursuant to the Rule, standard offer contracts must contain certain minimum specifications relating to, among other things, the term of the contract and the calculation of firm capacity payments. With respect to the term of standard offer contracts, Rule 25-17.0832(4)(e)7, requires:

Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the anticipated in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in service date of the avoided unit;

The above rule provides a range for the contract period tied to the plant life of the utilities' avoided unit by establishing a minimum and a maximum term for standard offer contracts.

The ten year minimum contract term, while not a requirement of PURPA, was mandated in order to assist utilities and cogenerators with planning. In Order No. 12634, issued October 27, 1983, Docket No. 820406-EU, Amendment of Rules 25-17.80 through 25-17.89 relation to cogeneration, we addressed the issue of a ten year minimum contract term. We stated:

The requirement that a QF be willing to sign a contract for the delivery of firm capacity for at least ten years after the originally anticipated in service date of the avoided unit is important from a planning perspective. While a ten-year contract will not offset the expected thirty year life of a base load generating unit, we believe it is of sufficient length to confer substantial capacity related benefits on the ratepayers.

Order No. 12634, pg. 19.

The purpose of the statute underlying Rule 25-17.0832(4)(e) is to encourage cogeneration. Pursuant to Rule 25-17.0837(2), Florida Administrative Code, investor-owned utilities with planned generation units not subject to Rule 25-22.082, Florida Administrative Code, are encouraged to negotiate contracts for the purchase of firm capacity and energy with utility and nonutility generators. Rule 25-17.0832(4) requires investor-owned utilities to offer standard offer contracts as an alternative for certain types of Qfs. Insofar as cogenerators' ability to enter into negotiated contracts is unaffected by the variance request, and a cogenerator retains the ability to enter into a five year standard offer contract with FPL, FPL's request for a variance satisfies the underlying purpose of the statute.

2. Substantial Hardship

An allegation of substantial hardship requires an affirmative demonstration by the petitioner of economic, technological, or legal hardship. Purchases made by FPL pursuant to the proposed Standard Offer Contract will not result in the deferral or avoidance of its proposed avoided unit, the 2002 CT. This is due to the subscription limit being 5 MW of a 165 MW unit. Therefore, we find that FPL has demonstrated in this case that application of the rule would create an economic hardship to its ratepayers who may bear the risk of generation which is not avoided or deferred.

3. Other Requests for Waiver/Variance of Rule

We note that we have granted other requests for variance or waiver of the ten year minimum contract requirements of Rule 25-17.0832(4)(e), Florida Administrative Code, to a five year term:

1. By Order No. PSC-99-1713-TRF-EG, issued on September 2, 1999, in Docket No. 990249-EG, we granted FPL a variance from this rule.
2. By Order No. PSC-00-0265-PAA-EG, issued February 8, 2000, in Docket No. 991526-EQ, we granted Florida Power Corporation a waiver of this rule. This order also directed that a rulemaking proceeding be initiated to amend Rule 25-17.0832(4)(e)(7), Florida Administrative Code, to amend the

contract term provision of the rule.

3. By Order No. PSC-00-0504-PAA-EQ, issued on March 7, 2000, in Docket No. 991973-EQ, we granted Florida Power Corporation a waiver of this rule.
4. On June 2, 2000, Tampa Electric Company petitioned for a waiver of the ten year minimum contract period in Docket No. 000684-EQ. That request was approved at our September 5, 2000, Agenda Conference.

The requests granted to date were granted on substantially the same grounds asserted by FPL in this docket.

In sum, we grant FPL's Petition for Variance from the minimum standard offer contract term because it satisfies the statutory requirements for a rule variance. FPL has demonstrated that the purpose of the underlying statute will be met if the variance is granted. This is so because cogeneration will continue to be encouraged through negotiated as well as standard offer contracts. In addition, FPL's Petition for Variance demonstrates that substantial hardship to its ratepayers would result from application of the rule.

III. PETITION FOR APPROVAL OF NEW STANDARD OFFER CONTRACT

For the reason's stated below, FPL's new Standard Offer Contract complies with Rule 25-17.0832, Florida Administrative Code, and is therefore approved.

Pursuant to federal law, the availability of standard rates is required for fossil-fueled QFs less than 100 kilowatts (0.1 MW) in size. 16 U.S.C. 2601 et seq., 16 U.S.C. 792 et seq., 18 CFR 292.304. Florida law requires us to "adopt appropriate goals for increasing the efficiency of energy consumption and increasing the development of cogeneration." Section 366.82(2), Florida Statutes. The Commission is further directed to "establish a funding program to encourage the development by local governments of solid waste facilities that use solid waste as a primary source of fuel for the production of electricity." Section 377.709, Florida Statutes.

These federal and state requirements were implemented through

our adoption of the Standard Offer Contract in Rule 25-17.0832(4)(a), Florida Administrative Code. Pursuant to this rule, each investor-owned electric utility must file with this agency a tariff and a Standard Offer Contract for the purchase of firm capacity and energy from small QFs. These provisions implement the requirements of PURPA and promote renewables and solid waste-fired facilities by providing a straightforward contract. Larger QFs and other non-utility generators may participate in a utility's Request For Proposal process pursuant to Rule 25-22.082, Florida Administrative Code.

To comply with Rule 25-17.0832(4)(a), Florida Administrative Code, FPL proposed a new Standard Offer Contract based on a CT unit with an in-service date of January 1, 2002, as its avoided unit. Specifically, the Contract is based on a 5 MW portion of a 165 MW CT. FPL has also proposed an associated tariff, COG-2 (firm capacity and energy). This tariff would expire on the earlier of the date the subscription limit (5 MW) is fully subscribed, or upon the expiration of the two week open solicitation period which would begin ten days after the date that a Consummating Order is issued in this docket.

We believe that FPL's evaluation criteria will be readily understandable to any developer who signs FPL's Standard Offer Contract. The avoided unit cost parameters appear to be reasonable for a CT unit, and the resulting capacity payments are appropriate. The performance provisions include dispatch and control and on-peak performance incentives.

Given that the subscription limit of FPL's avoided unit is only a portion of its total capacity, purchases made by FPL pursuant to the proposed Standard Offer Contract will not result in the deferral or avoidance of the 2002 CT unit. If FPL enters into Standard Offer Contracts, but the need for the 2002 CT unit is not deferred or avoided, FPL will essentially be paying twice for the same firm capacity. Therefore, the requirements of federal law and the implementation of state regulations discussed above may result in a subsidy to the QFs. We note, however, that the potential subsidy could be mitigated, as FPL may have opportunities to sell any surplus capacity on the wholesale market.

Ideally, QFs should compete on equal footing with all other

producers of electricity. However, until and unless there is a change in federal and state law, QFs are given some preferential treatment. We have minimized this unequal footing by requiring Standard Offer Contracts only for small QFs, renewables, or municipal solid waste facilities. These types of facilities may not be in a position to negotiate a purchased power agreement due to their size and the time and resources required for negotiations. Thus, our rules balance market imperfections with the existing policy of promoting QFs.

In summary, we do not expect that FPL's proposed Standard Offer Contract will result in the avoidance of its proposed avoided unit, a 2002 CT. Nonetheless, FPL's proposed contract and tariff comply with our cogeneration rules. For this reason, we approve FPL's petition to establish its new Standard Offer Contract and associated tariffs.

Because it would not be reasonable to have this tariff go into effect if the variance portion of this Order is protested, the tariff shall not be effective if any protest is filed. FPL's proposed standard offer contract shall become effective upon the issuance of the Consummating Order for the waiver if there is no timely protest filed to either the waiver or the standard offer contract portion of the order. The open solicitation period shall begin ten days after the effective date. The docket shall be closed upon the issuance of a Consummating Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power and Light Company's Petition for a Variance from Rule 25-17.0832(4)(e), Florida Administrative Code, is granted. It is further

ORDERED that Florida Power and Light Company's Petition for Approval of a Standard Offer Contract is approved. It is further

ORDERED that the tariff for the Standard Offer Contract shall become effective upon the issuance of a Consummating Order. The open solicitation period for the tariff shall begin ten days after issuance of a Consummating Order. It is further


ORDERED that if no timely protest is filed to either the variance or the standard offer contract portion of this Order, this docket shall be closed upon the issuance of a Consummating Order.

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ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 26th day of September, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The actions proposed herein are preliminary in nature. Any person whose substantial interests are affected by either of the actions proposed by this order may file a petition for a formal

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proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 17, 2000.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.