BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a Declaratory Statement by Wheelabrator North Broward Inc.	Docket No.	900277-EQ
	ORDER:	23110
	ISSUED:	6-25-90

The following Commissioners participated in the disposition of this matter:

MICHAEL WILSON, CHAIRMAN
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER

DECLARATORY STATEMENT

BY THE COMMISSION:

By Petition filed April 4, 1990, Wheelabrator North Broward, Inc., (Wheelabrator) a qualified facility and successor in interest to Broward Waste Energy Company, requested a declaratory statement from this Commission to determine whether and when it could exercise its one-time option to change its committed capacity under the terms of its 1987 "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility" with Florida Power and Light Company (FPL).

We determine that we have jurisdiction over this proceeding pursuant to sections 366.04(3), 366.04(9), and 120.565, Florida Statutes.

Interested parties should take note that Rule 25-22.021, Florida Administrative Code, states "... [a] declaratory statement is a means of resolving controversy or answering questions or doubts concerning the applicability of any statutory provision, rule, or order as it does, or may, apply to petitioner in his or her circumstances only." Our resolution of the question presented will apply only to Wheelabrator's particular circumstances. We have relied entirely on the facts presented in Wheelabrator's petition, and we have made no independent investigation or verification of those facts. Any material changes in the facts presented by petitioner may substantially alter or void this declaratory statement.

STATEMENT OF THE FACTS AND THE CASE

On March 13, 1987, Broward Waste Energy Company, Wheelabrator's predecessor, entered into a Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualified Facility with Florida Power and Light Company. FPL agreed to purchase all the electric power generated at the facility, a solid waste facility in North Broward County, and it agreed to make payments for the amount of capacity described in section 4.2.2 of the contract. By the terms of that section, Broward anticipated selling 45,000 KW of committed capacity to FPL, beginning on April 1, 1992, at rates based on the statewide avoided unit that has an anticipated in-service date of April 1, 1992. A one-time option was provided that allowed the qualifying facility to change its committed capacity after initial facility testing, but prior to the commercial in-service date or April 1, 1990, whichever occurred first. The facility is currently under construction, and is not scheduled for operation until the first part of 1992. Before April 1, 1990, Wheelabrator notified FPL by letter of a change in its committed capacity from 45,000 KW to 53,500 KW. This increased amount of committed capacity is an estimate based upon design changes to this facility and experience Wheelabrator has acquired in operating other plants.

Because initial facility testing has not occurred, Wheelabrator is unsure of the effect of its March 30, 1990 letter to FPL, and it is uncertain whether and when it may exercise the contract option to finalize its committed capacity. Wheelabrator has therefore filed this Petition for Declaratory Statement asking the Commission to interpret its obligation to establish the amount of capacity it is committed to sell to FPL under the provisions of section 4.2.2. Wheelabrator asks the Commission to issue a declaratory statement that its March 30, 1990 letter to FPL is a sufficient exercise of its one-time option to increase committed capacity under the terms of section 4.2.2 of the standard offer contract. It also asks the Commission to allow it to make a subsequent, additional "minor adjustment (equal to plus or minus 10%) to the March 30, 1990 anticipated committed capacity level of 53.5MW", after initial facility testing. If the Commission finds that Wheelabrator may not make an adjustment to its March 30, 1990 committed capacity amount, Wheelabrator alternatively asks the Commission to allow it an extension of time to exercise its one-time option after initial facility testing, even though that exercise would occur after April 1, 1990.

PRELIMINARY MATTERS

We find that in its Petition for Declaratory Statement,

Wheelabrator has met the threshold requirements of section 120.565, Florida Statutes, and Rule 25-22.021, Florida Administrative Code. It has demonstrated a genuine question or doubt regarding the legitimacy of changing its committed capacity amount under its standard offer contract with FPL. Therefore, we grant the Petition for Declaratory Statement, but not in favor of the position proposed by the petitioner.

QUESTION PRESENTED

When is the one-time option to notify FPL of a change in committed capacity available under the terms of Wheelabrator's standard offer contract?

DISCUSSION

Wheelabrator claims the answer to the question presented above is unclear, because the terms of section 4.2.2 of the standard offer contract conflict with each other. Wheelabrator argues that while the section requires notice of final committed capacity to be given after initial facility testing, Wheelabrator does not have to sell the capacity until April 1, 1992, the anticipated in-service date of the avoided unit. Testing could take place as late as the first quarter of 1992, but the notice of final committed capacity must be given to FPL no later than April 1, 1990.

Section 4.2.2 of the standard offer contract states:

> It is the intent of QF to sell 45,000 KW of committed capacity, beginning on April 1, 1992. QF shall have the one time option of finalizing its committed capacity after initial facility testing and specify (sic) when capacity payments are to begin. Such option shall be excercised by providing formal written notice, in accordance with Paragraph 9.7, informing FPL of any change in the committed capacity and beginning date above. In the event such notice is not received by FPL prior to the commercial in-service date of the facility of April 1, 1990, whichever occurs first, the committed capacity specified in this Paragraph shall be considered as the QF's committed capacity.

We do not perceive a conflict in the terms of this contract provision, and we can easily interpret its language in a manner that avoids any ambiguity. Section 4.2.2 plainly states that Wheelabrator has a one-time option to change its committed

capacity no later than April 1, 1990, or the commercial in-service date of the facility, whichever occurs first. The option may only be exercised, however, after facility testing. Initial facility testing is the condition precedent to exercise of the one-time option. If testing has not occurred before April 1, 1990, the option is not available, and "the committed capacity specified in this paragraph shall be considered as the QF's committed capacity". Initial facility testing may well occur long after April 1, 1990, but when it does, section 4.2.2 provides that the committed capacity amount will be the anticipated capacity amount provided in the contract, and the one-time option to modify the committed capacity amount is not available.

It has been the Commission's longstanding policy to encourage cogeneration while providing the utilities with the planning certainty to allow them to depend on the amount of capacity committed by QFs. To that end, the Commission requires utilities to purchase capacity from qualifying facilities while at the same time it prohibits a qualifying facility from increasing its capacity commitment to the utility without executing a new contract for the increased amount at the current avoided unit rate. The standard offer contract provision in question here was prescribed by Commission Rule 25-17.083 to support those policy goals.

In Order No. 13247, Docket No. 830377-EU, "In re: Proceedings to Implement Cogeneration Rules," the Commission discussed at length the need for planning certainty in response to a proposal that a QF be allowed to modify unilaterally its standard offer capacity commitment. The Commission noted that such a provision presumably "would afford more flexibility to the QF should minor differences between the design characteristics and actual performance of a proposed QF occur." (Emphasis added.) In this context, the Commission stated:

> Firm capacity purchases from QFs represent an alternative to the construction of conventional power plants. As such, when a utility enters into a contract for the purchase of firm capacity from a QF, the utility is entitled to rely on the level of capacity committed to defer the construction of otherwise needed power capacity. Allowing a QF to modify its capacity commitment, up or down, during the life of a standard offer contract only introduces uncertainty into the utility's planning process. This uncertainty results in the risk that a utility may construct too much or too little generating capacity to meet the needs of its customers. Neither situation is in the best

> interests of the ratepayers. The Rules pertaining to standard offer contracts have been carefully designed to provide the planning certainty required to allow a utility to depend on the QF capacity and defer additional power plant construction. Should a QF wish to increase its capacity commitment, it is easy enough to enter into another standard offer contract for the increased capacity.

The Commission rejected unilateral modifications, but stated it would consider allowing changes in committed capacity on a case by case basis, if mutually acceptable to the utility and the QF. It is clear, however, that the changes contemplated were to be based on a QF's actual performance, and actual performance can only be determined from facility testing.

The allowance for a moderate amount of flexibility must be tied to the results of facility testing. In Order No. 21585, Docket No. 890453-EQ, "In re Petition of Timber Energy Resources, Inc., for a Declaratory Statement Regarding Upward Modification of Committed Capacity Amount by Cogenerators," the Commission considered a contract provision very similar to Wheelabrator's and found:

> Section 4 of Florida Power's standard offer contract does address the need for a moderate amount of flexibility between what capacity a particular generating facility is predicted to produce (anticipated committed capacity) and what capacity that particular generating facility actually does produce <u>after a reasonable test period</u> (actual committed capacity). The flexibility, however, is purposely limited to small discrepancies between anticipated and actual committed capacity of the original generating facility. (Emphasis added.)

Some flexibility is permitted in Wheelabrator's contract also. Wheelabrator is allowed by contract to change its committed capacity, but only after initial facility testing and only before April 1, 1990. Allowing it to change its committed capacity before that date without testing the facility, or after that date with testing, introduces unnecessary uncertainty into the planning process and defeats the purpose of providing flexibility. As the Commission stated in <u>Timber Energy</u>, the contract provisions are "clearly crafted to support the development of cogeneration while at the same time establishing a stability in the contractual process which contributes to stability in the utility planning

process." Order No. 21585, page 4.

The Commission prohibited Timber Energy from increasing its capacity commitment to the utility without executing a new contract for the increased amount at the current avoided unit rate. The Commission recognized the problems inherent in allowing QFs to obtain the older, higher avoided unit rates for an entire project by constructing additional capacity at a time when avoided costs are lower. Wheelabrator argues, however, that its desire to increase its committed capacity is not motivated by the fact that the 1992 avoided unit rates are higher than the current avoided unit rates. It contends that because of the 1989 change to the risk factor in section 366.051, Florida Statutes, the difference in the avoided unit rates is effectively "a wash." Petition, page 6. If that is the case, Wheelabrator should not have a problem with entering into another standard offer contract at the current avoided unit rate for the increased capacity that results from its design changes. As the Commission noted in its order implementing the cogeneration rules, it is easy enough to enter into another standard offer contract for the increased capacity at the current avoided unit rate. Then, after the initial facility testing which is scheduled to occur in late 1991, Wheelabrator may exercise its option to modify its new capacity commitment based upon the actual capacity of its facility.

CONCLUSION

We hold that our rules concerning utilities' obligations to cogenerators and small power producers, Rule 25-17.080, et. seq., Florida Administrative Code, and the Commission's policies articulated in Order Nos. 13247 and 21585, do not allow Wheelabrator to exercise the one-time option to change its committed capacity before initial facility testing or after April 1, 1990. Wheelabrator must execute another contract for the increased amount of capacity at the current avoided unit rate if it wishes to increase its capacity commitment to Florida Power and Light Company. Wheelabrator may then make adjustments for small discrepancies between anticipated and actual capacity after facility testing, as the contract permits.

Now, therefore, it is

ORDERED by the Florida Public Service Commission that the Petition for a Declaratory Statement filed by Wheelabrator North Broward, Inc. is granted. It is further

ORDERED that the substance of the Declaratory Statement is as set forth in the body of this order. It is further

ORDERED that this docket should be closed.

By Direction of the Florida Public Service Commission, this 25th day of JUNE, 1990.

STEVE TRIBBLE, 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 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.