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Subject: PEF's Post-Hearing Brief - Dkt# 080501-EQ
Attachments: Document.pdf

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Docket No. 080501-EQ

On behalf of Progress Energy Florida

Consisting of 12 pages.

The attached for filing is PEF's SOC Post-Hearing Brief in the above referenced docket.

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May 18, 2009

VIA ELECTRONIC FILING

Ms. Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Petition for waiver of Rule 25-17.250(1) and (2)(a), F.A.C., which requires Progress Energy Florida to have a standard offer contract open until a request for proposal is issued for same avoided unit in standard offer contract, and for approval of standard offer contract; **Docket No. 080501-EQ**

Dear Ms. Cole:

On behalf of Progress Energy Florida, Inc. ("PEF"), please find enclosed for filing its Post-Hearing Brief in the above referenced docket.

Please acknowledge your receipt of the above filing as provided in the Commission's electronic filing procedures. Thank you for your assistance in this matter.

Sincerely,


John T. Burnett

JTB/lms
Attachment

cc: Parties of Record

DOCUMENT NUMBER-DATE
04788 MAY 18 09
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for waiver of Rule 25-17.250(1) and (2)(a), F.A.C., which requires Progress Energy Florida to have a standard offer contract open until a request for proposal is issued for same avoided unit in standard offer contract, and for approval of standard offer contract

Docket No. 080501-EQ

Filed: May 18, 2009

PROGRESS ENERGY FLORIDA, INC.'S POST-HEARING BRIEF AND STATEMENT OF ISSUES AND POSITIONS

Pursuant to Order No. PSC-09-0214-PHO-EI, Progress Energy Florida, Inc. ("PEF" or the "Company") hereby submits its Post-Hearing Brief and Statement of Issues and Positions in support of PEF's Standard Offer Contract with certain changes proposed by White Springs Agricultural Chemicals - PCS Phosphate ("PCS Phosphate") and agreed upon by PEF. The agreed upon changes are reflected in PEF's Standard Offer Contract filed April 1, 2009 in Docket No. 090162-EQ. PEF submits that the record in this case conclusively demonstrates that PEF's Standard Offer Contract is reasonable and in compliance with Rules 25-17.200 through 25-17.310, Florida Administrative Code.

I. Introduction and Overview

Pursuant to Rule 25-17.0832(4), F.A.C., Standard Offer Contracts are designed for all renewable facilities and qualifying facilities with a design capacity of 100 kW or less. Standard Offer Contracts were developed pursuant to the Public Utility Regulatory Policy Act ("PURPA") which was passed by Congress in 1978. Since 1984, Florida utilities have submitted their Standard Offer Contracts to the Florida Public Service Commission ("FPSC" or "Commission") for review and approval. Because the Standard Offer Contract is offered to all renewable suppliers and qualifying facilities, its terms must be broad and more generalized. (Direct

Testimony of David Gammon, P.5, L. 15-22). The Standard Offer Contract for Renewable Energy and Qualifying Facilities is a contract that PEF must offer and be obligated under without any negotiation.¹ (Tr. P. 141, L.9-11).

PCS Phosphate, a chemical company located in PEF's service territory, filed a protest on July 2, 2007 in Docket No. 070235-EQ and again on November 13, 2008 in Docket No. 080501-EQ stating that the terms and conditions in PEF's Standard Offer Contract were unreasonable.

Despite the fact that PCS Phosphate does not utilize PEF's Standard Offer Contract, but instead uses a different mechanism to provide power to PEF, PCS Phosphate, through its protest, is attempting to mold PEF's Standard Offer Contract into a contract that best fits their needs. That is not what a Standard Offer Contract is designed for. Additional or different provisions, which are tailored to a particular renewable generator's needs, can be negotiated, using the Standard Offer Contract as a baseline to begin negotiations.

PEF has worked with PCS Phosphate in good faith since they first filed their protest, and PEF has made twelve (12) of PCS Phosphate's twenty (20) proposed changes to the Standard Offer Contract in an attempt to resolve this matter. (Tr. P.9, L. 24-25; Tr. P.10, L. 1-2). As a result, eight (8) issues remain unresolved. The remaining eight of PCS Phosphate's suggested changes would hurt PEF's customers financially, and customers would not get the full value of what they paid for should the changes occur. (Tr. P.140, L.23-25). Accordingly, PCS Phosphate's Protest should be dismissed, and PEF's modified standard offer contract should be approved.

II. Remaining Issues

¹ PCS Phosphate Witness Marz admits this fact. (Tr. P.113, L.13). (Tr. P.113, L. 19).

Capacity and Availability Factors

PEF's Standard Offer Contract does not require a dispatch option, which means that PEF does not have the ability to tell the generator when to run and when not to run. If a generator were required to be dispatchable, then the *Capacity Factor* of PEF's Avoided Unit would be the appropriate measure of performance, but the renewable supplier would be required to start or stop generating depending upon PEF's system economics and reliability criteria. (Direct Testimony of David Gammon, P.28, L. 18-19). Thus, any contention from PCS Phosphate that the capacity factor of PEF's avoided unit is the appropriate measurement for the Standard Offer Contract is simply wrong. Instead, under PEF's Standard Offer Contract, the renewable energy supplier is simply required to operate whenever it can. (Direct Testimony of David Gammon, P.28, L. 21-23). Under this type of "must-take" contract, the renewable generator operates whenever it has the ability to do so and the *Availability Factor* of the Avoided Unit is the appropriate measure of performance. (Direct Testimony of David Gammon, P.28, L. 21-23 and P.29, L.1-6).

By arguing that PCS Phosphate should be paid based on a capacity factor rather than on an availability factor, PCS Phosphate apparently, believes that a renewable generator should be paid like an avoided unit, but not act like one. (Tr. P.10, L. 22-25; Tr. P.11, L. 1). However, if PCS Phosphate signs a contract with PEF to supply 20MW of power 90% of the time that power is needed, then PEF's customers should get the 20MW of power 90% of the time because that is what they are paying for. If PCS doesn't want to perform like an avoided unit, then they are essentially asking PEF's customers to pay them for power at the avoided cost without delivering its contracted amount. If PEF is in need of the power that PCS Phosphate is supposed to provide and has to go elsewhere to supply the demand because PCS Phosphate isn't providing their contractual amount, PEF's customers have to pay both for the power they are not receiving from

PCS Phosphate and for the power that PEF has to buy to replace what PCS Phosphate should be providing. (Tr. P.11, L. 2-3). Such a situation is obviously not fair to PEF's customers.

Right of First Refusal

PEF takes issue with PCS Phosphate's request to execute on a right of first refusal to buy renewable energy credits ("REC") from them in three (3) days. PEF's Standard Offer Contract currently states thirty (30) days. However, in good faith, PEF proposed changing the thirty (30) days to ten (10) days, which up to the date of the Hearing, PCS refused to accept. At the Hearing, however, Mr. Marz did accept changing the three (3) days to the ten (10) days that PEF proposed. (Tr. P.116, L. 12-22).

Despite this fact, however, PEF is aware of the Commission's recent ruling in Docket No. 080193-EQ. In the Staff's Recommendation, dated April 23, 2009, which was adopted by the Commission on May 5, 2009, the Commission stated:

"In order to comply with provisions of ownership rights in Rule 25-17.280, F.A.C., the provision giving FPL right of first refusal to purchase TRECs from the renewable provider should not be included in the standard offer contract. The standard offer contract should not provide any unique benefit or advantage to the utility as to notification or review of price, availability, or any other aspect of TRECs, or any other renewable attributes. All arrangements between the renewable provider and any other party, with regard to any renewable attributes, should be the subject of negotiated contractual provisions." (Pg. 29)

"The evidence in the record makes clear that the interests of the renewable provider are negatively impacted by this provision at the present time. The rights of ownership, including the right to sell freely in the appropriate marketplace, are clearly impaired by imposing a 30-day waiting period when trades are completed in less than 3 days." (Pg. 29)

"Unless the renewable provider can put forth offers and respond to buyers unimpeded, the provider's ownership rights are impaired." (Pg. 29)

As a result, the Commission denied FPL's standard offer contract tariff with respect to a right of first refusal for purchase of TREC's. With this fact being noted, PEF agrees to remove

the right of first refusal from its Standard Offer Contract and will re-file its Standard Offer Contract to reflect this change prior to the Commission's vote on PEF's Standard Offer Contract in Docket No. 090162-EQ.

Interruptible power

PCS Phosphate wants the Commission to allow renewable producers to use interruptible power to start up their units. (Marz Direct Testimony, Exhibit MJM-1, P. 22 of 49). PCS Phosphate proposes a deletion of PEF's SOC, Section 6.3 which currently reads, "*The RF/QF shall not rely on interruptible standby service for the start up requirements (initial or otherwise) of the Facility.*" The implications of PCS Phosphate's proposed change are major. If PEF encounters a system emergency and there becomes an urgent need for power where PEF begins to curtail its customers on interruptible standby service, PEF would call upon any QF or renewable producer, including PCS Phosphate, to start up and provide power. (Tr. P.11, L. 14-19). Under PCS Phosphate's suggested change, however, those power producers would not be able to provide the power PEF is paying them for because if their start up power has been interrupted, they logically cannot start their units. In fact, PCS Phosphate witness Marz admits that by removing Section 6.3, PEF and its customers may be exposed to the risk of not receiving power when PEF needs it. (Tr. P.118, L. 5). If this happens, the result is simple - PEF's customers would not receive the power they are paying for at the time they need it most. (Tr. P.11, L. 20-22). These facts conclusively show that Section 6.3 should remain intact and that PCS Phosphate's suggested changed should be rejected.

Capacity Testing

Currently, PEF's Standard Offer Contract states that if PEF has good cause to believe there is a problem with the RF/QF's unit, then PEF "*shall have the right to require RF/QF to*

validate the committed capacity via a Committed Capacity Test at any time, up to two (2) times per year.” (PEF SOC, Section 7.4). PCS Phosphate suggests that even if PEF has good cause to believe there is a problem with their unit, PEF cannot ask them to perform a test to prove their unit is properly functioning unless six months has passed from the last test. (Marz Direct Testimony, P.18, L. 20-21). PCS Phosphate also states that PEF’s customers should pay for the test. (Marz Direct Testimony, Exhibit MJM-1, Page 24 of 49). These proposals defy logic. If PEF has good cause to believe there is a problem with the RF/QF’s unit, then the RF/QF should have to prove to PEF that they can actually run their unit like they are supposed to, and they should pay for that test, not PEF’s customers. At the hearing for this matter, PCS Phosphate agreed that they are effectively denying PEF the ability to come in and ask the RF/QF to prove their unit can actually deliver power when PEF has good cause to believe it cannot. (Tr. P. 120, L. 12-13). Therefore, allowing PCS Phosphate’s changes would only harm PEF’s customers by denying them the ability to ensure they are going to get the power they are paying for.

Committed Capacity Test

PCS Phosphate also opposes a provision that requires them to run their unit for 24 hours when it first goes online, and only if requested by PEF thereafter, to prove that the unit actually works. (Tr. P.12, L. 7-10). Witness Marz proposes to add language to the end of the first sentence in Section 8.2 that reads, “*or for such other period as the parties may agree.*” (Marz Direct Testimony, P. 18, L. 23). He goes on to explain that this language would “*make clear that the testing procedures may be revised to meet the unique characteristics of the particular type of facility being installed.*” (Marz Direct Testimony, P. 19, L. 1-2). What PCS Phosphate and Mr. Marz ignore, however, is the fact that it is the renewable facility’s obligation to ensure it is capable of performing to produce power in a manner equivalent to PEF’s avoided unit at all

times, much less for 24 hours. At the hearing for this matter, PCS Phosphate witness Marz admitted that it's not unreasonable to ask a plant to demonstrate that it can operate for 24 hours without there being a problem, so PCS Phosphate's proposed change to Section 8.2 of the Standard Offer Contract is moot and should be rejected. (Tr. P. 121, L. 6-7).

Maintenance

In PEF's Ten Year Site Plan ("Plan"), PEF identifies its next avoided unit. In its current Plan, PEF projects that the avoided unit PCS Phosphate's facility would be compared to, and would avoid PEF from building, would be offline for 15 days per year for maintenance. PEF has built this provision into its Standard Offer Contract in Section 10.2. PCS Phosphate is proposing a change in PEF's Standard Offer Contract to have 30 days for maintenance. (Marz Direct Testimony, P.27, L. 21-22). If this were to occur, PEF would have to buy replacement power for those additional 15 days – a cost that would be borne by PEF's customers. By allowing PCS Phosphate 30 days for maintenance instead of the 15 days allocated to the Avoided Unit, PCS Phosphate is essentially asking PEF to pay them for 350 days of power throughout the year when they are only providing 335 days of power. At the Hearing, Witness Marz agreed that this would be the case (Tr. P. 122, L. 20-22). Accordingly, PCS Phosphate's suggested change to Section 10.2 is admittedly unfair to PEF's customers and should be rejected.

Performance Security

Section 11.1 in PEF's Standard Offer Contract calls for RF/QF producers to provide a performance security in order to protect PEF and its customers should an RF/QF unit fail to operate resulting in PEF having to buy replacement power. PCS Phosphate opposes posting a security that would be in place for the entire life of the contract. (Tr. P. 123, L. 7-10). Instead, PCS Phosphate proposed providing a performance security only until completion of the facility

and demonstration that the facility can deliver the capacity specified in the contract. (Testimony of Martin Marz, Exhibit MJM-1, Page 29 of 49). This makes no sense as it would only provide PEF's customer's protection for a fraction of the time that the Standard Offer Contract would be in place. PCS Phosphate's opposition to providing a performance security to offset some of the costs to buy replacement power is clearly an effort to side step financial responsibility should their plant fail to operate after its commercial in-service date. Simply stated, if an RF/QF does not post a security, PEF's customers would bear that risk. (Tr. P.12, L.25; Tr. P.13, L.1-3). An RF/QF should be required to post a performance security for protection of PEF and its customers, and PCS Phosphate's proposed changes in this regard should be denied.

Creditworthiness Provision

PEF is obligated to sign its Standard Offer Contract with any RF/QF who is willing to accept the terms and conditions set forth in the contract. (Tr. P.10, L. 13-15). PEF cannot walk away, and PEF is mandated to pay for the power it receives from the RF/QF. (Tr. P.13, L. 9-10). Conversely, RF/QF providers can chose who they want to contract with, when they want to contract, and how they want to contract.

In the matter at hand, and contrary to normal business practices, PCS Phosphate suggests adding a new provision that requires PEF to post a security in case PEF's credit rating drops below a certain level. (Marz Direct Testimony, Exhibit MJM-1, Page 31 of 49). It is both unfair and unnecessary to place this additional financial burden on PEF's customers because it is the RF/QF's responsibility to provide reliable power to PEF's customers, and PEF is mandated by rules and regulations to pay for that power. In fact, witness Marz freely admits that PEF's ratepayers would bear the costs of this type of creditworthiness security. (Tr. P.126, L. 17-25; Tr. P. 127, L. 1-8). Since PEF is obligated to pay for the power it receives from RF/QF

producers, the changes requested by PCS Phosphate in this regard do nothing more than add unnecessary expenses that PEF's customers have to pay for, and those proposed changes should be denied.

III. Post-Hearing Statement of Issues and Positions

ISSUE 1: Is the standard offer contract filed by Progress Energy Florida on July 15, 2008 in compliance with Rules 25-17.200 through 25-17.310, Florida Administrative Code?

PEF: *Yes. PEF has demonstrated in this case that its Standard Offer Contract complies with the Commission's Standard Offer Contract rules, Rules 25-17.200 through 25-17.310, F.A.C.*

ISSUE 2: Does the standard offer contract filed by Progress Energy Florida on July 15, 2008 contain terms and conditions that are not consistent with Rules 25-17.001 and 25-17.200 through 25-17.310, F.A.C.?

PEF: *No. PEF has demonstrated that its Standard Offer Contract terms and conditions are consistent with Rules 25-17.001 and 25-17.200 through 25-17.310, F.A.C.*

ISSUE 3: Do the non-price terms and conditions of PEF's standard offer contract that are not specifically addressed by Florida Statutes or Commission regulations comply with the policies and purposes set forth in Section 366.91, F.S. and Rules 25-17.001 and 25-17.200, F.A.C.?

PEF: *Yes.*

ISSUE 4: Does the standard offer contract's methodology for determining an RF/QF's capacity payments comply with the requirements of Rules 25-17.200 through 25-17.310, F.A.C.?

PEF: *Yes.*

ISSUE 5: Should Docket 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., be closed?

PEF: *Yes. The Hearing conducted on April 16, 2009 consolidated the issues contained in both Docket No. 070235-EQ and Docket No. 080501-EQ. Docket No. 070235-EQ should be closed and a final determination should be made in Docket No. 080501-EQ.*


ISSUE 6: Should this docket be closed?

PEF: *Yes, upon resolution of the issues raised in this case and upon the filing of any necessitated changes to PEF's currently proposed Standard Offer Contract in Docket 090162-EQ.*

IV. Conclusion

For all the reasons discussed in detail above, the Commission should deny the remaining issues from PCS Phosphate's protest that are still in dispute in this matter and, upon the filing of any necessary changes, approve PEF's Standard Offer Contract filed in Docket No. 090162-EQ.

Respectfully submitted this 18th day of May, 2009.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the following this 18th day of May, 2009.



Attorney

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