

In re: Petition of Tampa Electric Company for approval of new standard offer contract for qualifying cogeneration and small power production facilities, and for waiver requirement in Rule 25-17.0832(4)(e)7, F.A.C., that standard offer contracts have a ten-year term.

DOCKET NO. 020725-EQ  
ORDER NO. PSC-02-1625-PAA-EQ  
ISSUED: November 25, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman  
J. TERRY DEASON  
BRAULIO L. BAEZ  
MICHAEL A. PALECKI  
RUDOLPH "RUDY" BRADLEY

NOTICE OF PROPOSED AGENCY ACTION  
ON APPROVING RULE WAIVER AND NEW STANDARD OFFER CONTRACT

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 interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

On July 15, 2002, Tampa Electric Company (TECO) filed a Petition for Approval of a Standard Offer Contract (Petition) for qualifying cogeneration and small power production facilities. The proposed contract and associated tariffs are based on a 5 MW

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subscription limit of a 180 MW combustion turbine generating unit, Polk Unit 4, with an anticipated in-service date of May 1, 2005.

Along with its July 15, 2002, Petition, TECO filed a Petition for Waiver of Rule 25-17.0832(4)(e)7., Florida Administrative Code (Petition for Waiver). TECO seeks a waiver from the 10-year minimum contract term required by the rule, and proposes a 5-year contract term.

At the September 3, 2002 Agenda Conference, we suspended the tariff revisions filed as part of TECO's Petition. The tariff suspension allowed sufficient time to review TECO's Petition.

This Order addresses both the Petition for Approval of the proposed Standard Offer Contract and the requested Petition for Waiver. We have jurisdiction pursuant to Sections 120.542, 366.04, 366.05, 366.051, 366.06, and 366.80 through 366.82, Florida Statutes.

#### RULE WAIVER

##### I. Standard Of Review

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

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. . . .

Thus, under the statute, a person requesting a variance or waiver must affirmatively demonstrate that the purpose of the underlying statute has been or will be 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.

As stated in the case background, TECO filed its Petition For Waiver in conjunction with its Petition For Approval Of A Standard Offer Contract. The waiver requested by TECO is for a fixed standard offer contract term of five years instead of the ten-year minimum contract term required by Rule 25-17.0832(4)(e)7., Florida Administrative Code. Notice of the waiver request was published in the Florida Administrative Weekly on August 30, 2002. The comment period expired on September 14, 2002. No comments in opposition to the Petition For Waiver were received.

## II. TECO's Petition for Waiver

As stated above, a petitioner for waiver of a rule must show: (1) that the purpose of the underlying statute has been or will be met; and (2) that the petitioner will either suffer "substantial hardship" or that "principles of fairness" will be violated. TECO claims that its Petition for Waiver demonstrates that it satisfies each of the two requirements. TECO argues that it has satisfied both these requirements as set forth below.

### A. Purpose of the Underlying Statute

In its Petition for Waiver, TECO correctly identifies Section 366.051, Florida Statutes, as the underlying statute implemented by the rule from which a variance is requested. According to TECO, the purpose of that statute (and the Public Utility Regulatory Policies Act of 1978 - PURPA) with respect to cogeneration and small power production is to "encourage cogeneration while at the same time protect ratepayers from paying costs in excess of avoided costs."

TECO states that the above-noted purpose "will be achieved by utilizing a five-year contract term." TECO further notes neither PURPA nor Section 366.051, Florida Statutes, mandate a minimum term, and that the continued availability of standard offer contracts would provide "more than enough incentive to encourage the development of cogeneration in accordance with the statutes."

Finally, in paragraph 8 of its Petition for Waiver, TECO notes as follows:

In considering the Standard Offer filed by Florida Power & Light Company in Docket No. 990249-EG, the Commission granted a variance from the rule's minimum ten-year requirement and approved a five-year term (Order No. 99-1713-TRF-EG, issued September 2, 1999, pages 10-16). The policy reasons relied on by the Commission in approving the five-year term - ratepayer protection and adequate QF incentive - are equally applicable to this petition. The Commission, likewise, recently granted a rule waiver allowing Florida Power Corporation to use a five-year term in its Standard Offer. See Order No. 00-0504-PAA-EQ, issued on March 7, 2000 in Docket No. 991973-EQ. The Commission granted the same rule waiver request for Tampa Electric in the company's last Standard Offer Contract approved in Order No. PSC-01-1418-PAA-EQ issued June 29, 2001 in Docket No. 010334-EQ.

B. Substantial Hardship

TECO asserts that strict adherence to the ten-year term would create a substantial hardship on both it and its ratepayers. Specifically, TECO argues that "new technologies and other factors may lower" costs over the coming years and that "limiting the term of the Standard Offer to five years" would give TECO "the opportunity to revisit the issue of its avoided cost and take advantage of lower costs for the benefit of ratepayers prior to the passage of a full ten years." TECO further argues that it "would subject the company to substantial hardship by adversely affecting its cost structure, and would subject its ratepayers to substantial hardship by raising the price that they would otherwise have to pay for electricity," if TECO were required "to adhere to a ten-year term in the face of declining costs."

III. Analysis

A. Purpose Of The Underlying Statute

The purpose of Section 366.051, Florida Statutes, to encourage cogeneration and small power production, is expressly stated in the

statute: "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, Subparagraph 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 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 by us 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, addressing the issue of a ten-year minimum contract term, we stated:

The requirement that a QF [qualifying facility] 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.

However, as noted by TECO, in three successive orders involving Florida Power and Light Company, Florida Power Corporation, and TECO, respectively, we have found that the purpose of the underlying statute to encourage cogeneration has been met by allowing this waiver to a five-year period. To promote cogeneration, investor-owned utility's 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 non-utility generators. Rule 25-17.0837(1), Florida Administrative Code. The alternative provision is standard offer contracts. Insofar as a cogenerator's ability to enter into negotiated contracts is unaffected by the variance request, and a cogenerator retains the ability to enter into a five-year minimum standard offer contract with TECO, TECO's request for a variance appears to satisfy the underlying purpose of the statute.

B. Substantial Hardship

An allegation of substantial hardship requires an affirmative demonstration by the petitioner of economic, technological or legal hardship. The hardship demonstrated by TECO is economic hardship to its ratepayers who may bear the risk of generation which is not avoided or deferred.

C. Conclusion

In sum, we find that TECO's Petition for Waiver from the minimum standard offer contract term shall be granted because it satisfies the mandatory statutory requirements. TECO has demonstrated that the purpose of the underlying statute will be met if the waiver is granted, because cogeneration will continue to be encouraged through negotiated as well as standard offer contracts. In addition, TECO's Petition for Waiver demonstrates substantial hardship to its ratepayers.

NEW STANDARD OFFER CONTRACT

Pursuant to federal law, the availability of standard rates is required for fossil-fueled qualifying facilities 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 this Commission to

"adopt appropriate goals for increasing the efficiency of energy consumption and increasing the development of cogeneration." Section 366.82(2), Florida Statutes. We are 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 by us 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 a tariff and a Standard Offer Contract. These provisions implement the requirements of PURPA and promote renewables and solid waste-fired facilities by providing a straightforward contract. Larger qualifying facilities 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, TECO proposes a new Standard Offer Contract based on a 5 MW portion of TECO's next identified generating unit, Polk Unit 4, a 180 MW combustion turbine (CT) unit with an anticipated in-service date of May 1, 2005. CT units typically require about 18 months to construct. Therefore, TECO will need to commence construction by November 1, 2003.

TECO's proposed COG-2 (firm capacity and energy) tariff includes a three-week open season period for receiving standard offer contracts. If TECO does not fully subscribe the 5 MW available for Standard Offer Contracts during the initial three-week open season period, an additional three-week open season period will be held within 60 days. This open season period is similar to that contained in previous TECO Standard Offer Contracts which have been approved by us.

The evaluation criteria contained in TECO's proposed Standard Offer Contract should be readily understandable to any developer who signs the contract. The avoided unit cost parameters appear to be reasonable for a CT unit, and the resulting capacity payments are appropriate.

It is unlikely that purchases made by TECO pursuant to the proposed Standard Offer Contract will result in the deferral or avoidance of TECO's 2005 CT unit, because: 1) the eligibility pool for Standard Offer Contracts is limited; 2) the subscription limit of TECO's avoided unit is only a portion of the CT unit's total capacity; and, 3) TECO has not received any takers for its last three Standard Offer Contracts. The interest in TECO's last three Standard Offer Contracts may have been reduced because the contracts were all based on CT units. Capacity payments for CT units are typically low relative to capacity payments based on other generation technologies such as combined cycle or coal.

If TECO signs Standard Offer Contracts under the proposed contract, but the need for the 2005 CT unit is not deferred or avoided, TECO will essentially be paying twice for the same firm capacity. Therefore, the requirements of federal law and the implementation of the state regulations discussed above may result in a subsidy to the qualifying facilities. However, the potential subsidy could be mitigated, as TECO may have opportunities to sell any surplus capacity on the wholesale market.

Ideally, qualifying facilities should compete on equal footing with all other producers of electricity. However, until and unless there is a change in federal and state law, qualifying facilities are to be given some preferential treatment. We have minimized this unequal footing by requiring Standard Offer Contracts only for small qualifying facilities, 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 or timing. Thus, our rules balance market imperfections with the existing policy of promoting qualifying facilities.

While we do not expect that TECO's proposed Standard Offer Contract will result in the avoidance of the 2005 CT unit, the proposed contract and tariffs do comply with our cogeneration rules. For this reason, TECO's petition to establish its new Standard Offer Contract and associated tariffs is approved.

In order to process both the waiver request and the tariff filing simultaneously, we have used the proposed agency action process instead of the tariff process. While both processes provide for a point of entry for protest, under the tariff process,



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if there is a protest, the tariff would go into effect pending the outcome of the hearing; whereas under the proposed agency action process, if protested, the tariff would not go into effect as the proposed agency action order becomes a nullity. Therefore, TECO's proposed Standard Offer Contract shall only become effective upon the issuance of a consummating order. If there is no timely protest, the docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's Petition for Waiver of Rule 25-17.0832(4)(e)7., Florida Administrative Code, is granted. It is further

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 the Commission Clerk and Administrative Services, 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 Tampa Electric Company's Petition for Approval of a Standard Offer Contract with a contract term of five years is approved. It is further

ORDERED that this new Standard Offer Contract shall become effective upon the issuance of a Consummating Order if no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of this Order. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed upon the issuance of the Consummating Order.

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By ORDER of the Florida Public Service Commission this 25th  
day of November, 2002.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records and Hearing  
Services

( S E A L )

RRJ

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 action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding,

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in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 16, 2002.

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/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.