

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power Corporation for waiver of Rule 25-22.082, FAC., selection of generating capacity.

DOCKET NO. 981360-EI
ORDER NO. PSC-99-0232-FOF-EI
ISSUED: February 9, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING PETITION FOR RULE WAIVER

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.

I. CASE BACKGROUND

Section 403.519, Florida Statutes, commonly called the Need Determination Statute, requires that the Commission consider "whether the proposed plant is the most cost-effective alternative available" in the context of a need determination proceeding. Pursuant to Rule 25-22.082(2), Florida Administrative Code, prior to filing a petition for determination of need, each investor-owned electric utility must evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals (RFP). Section 120.542, Florida Statutes, provides for rule waivers when certain statutory criteria are met. Rule 25-22.082(9), Florida Administrative Code, allows the Commission to waive the RFP requirements upon a "showing that the waiver would likely result in

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a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest." While the later expression of legislative intent in Section 120.542, Florida Statutes, supersedes the rule, this order addresses both sets of criteria.

On October 20, 1998, Florida Power Corporation (FPC) filed a request to waive Rule 25-22.082, Florida Administrative Code. FPC's requested rule waiver is based on what it believes to be unique cost, scheduling, site, environmental, and utility control advantages of constructing the second unit at its existing Hines Energy complex. As authority for its request, FPC cites to Rule 25-22.082(9), Florida Administrative Code, as well as Section 120.542, Florida Statutes. As required by Section 120.542, Florida Statutes, notice of FPC's waiver request was published in Florida Administrative Weekly on November 13, 1998. Rule 28-104.003, Florida Administrative Code, provides for written comments on the petition for waiver to be filed within 14 days after the notice is published in Florida Administrative Weekly. Thus, the comment period was over on November 27, 1998. Since Friday, November 27, 1998 was a state holiday, the comment period expired November 30, 1998. Two interested persons filed comments. On November 30, 1998, the Electric Power Supply Association filed comments. On December 1, 1998, the Florida Industrial Cogeneration Association also filed comments. Both entities opposed the waiver request.

II. TIMELINESS OF FLORIDA INDUSTRIAL COGENERATION ASSOCIATION'S COMMENTS

On December 1, 1998, the Florida Industrial Cogeneration Association (FICA) filed comments requesting denial of the petition. By letter dated December 10, 1998, FPC suggested that FICA's comments were untimely and not entitled to consideration in this proceeding. FPC claimed the due date was November 30, 1998. In response to FPC's letter, FICA provided a Federal Express waybill showing that its comments were forwarded in time to be filed on the 30th. A delivery error appears to be responsible for the one-day delay.

We believe that the one day's lateness is not fatal to our ability to consider the comments. The comments are technically late under the Uniform Rule. However, in our opinion, the comment date is not a jurisdictional date. Further, the Federal Express

waybill shows FICA's effort to assure that the comments would be timely filed. Finally, this matter is being considered as Proposed Agency Action. Thus, any interested person, including FICA, could address the Commission at the agenda conference. Having apparently acted in good faith to assert its rights, we find therefore, it is appropriate to consider FICA's comments as timely filed.

III. WAIVER OF RULE 25-22.082, FLORIDA ADMINISTRATIVE CODE

FPC has requested a waiver of Rule 25-22.082, Florida Administrative Code, in order to proceed with the certification of Hines 2, a second 500 MW combined cycle unit to be built at its existing Hines Energy complex in Polk County. In addressing the public interest aspects of their request for rule waiver, FPC has alleged that:

1. Hines 2 will be an advanced technology 500 MW combined cycle unit similar in design to Hines 1.
2. Because of concerns with recent record high summer temperatures, practical limitations experienced with the company's reliance on dispatchable DSM programs (direct load control), and the adequacy of reserves statewide, FPC has decided to accelerate the in-service date of Hines 2 from late 2004 to the summer of 2001.
3. As the second unit at an existing developed site, Hines 2 will have a scheduling and cost advantage over other supply side alternatives.
4. Hines 2 will improve the balance between company-owned generation and purchased power. Because of FPC's relatively high percentage of purchased power and the practice of major bond rating agencies to impute a portion of a utility's long-term purchased power obligations to the debt component of its capital structure, Hines 2 will help maintain the utility's debt/equity ratio.

In addition to these factors, FPC has committed not to initiate any proceeding to increase its current base rates for a period of at least five years from the unit's commercial in-service date (or through mid-2006 based on the unit's current in-service schedule).

Waiver pursuant to Section 120.542, Florida Statutes

Section 120.542, Florida Statutes, 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 statutes 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.

FPC asserts that the application of the rule in this instance creates a substantial hardship for FPC and its customers. FPC further argues that the purpose of the underlying statute will be achieved if FPC's petition is granted.

Statewide Reliability

Planned generating reserves have become questionable because of a series of unforeseen reliability modeling questions that arise primarily from the recent higher generating unit availabilities and an unprecedented reliance on load management and other non-firm loads.

Generating unit availabilities have increased from about 80 percent in 1988 to 89 percent in 1997 because of improved maintenance and spare parts practices. The higher the generating unit availabilities, the lower the reserve margin required for a given overall generating reliability. This has led to planned reserve margins being much lower than historically acceptable levels, but still being offered as adequate. This new methodology is, as yet, untested.

FPC has relied on load management more than any other electric utility in the nation. Load management has been viewed as the functional equivalent of a peaking type generating unit. These units have a low installed cost, a lower fuel efficiency than a combined-cycle unit, and are operated only a few hundred hours per year. The 1998 summer heat wave caused the use of load management to exceed customer tolerance levels. About 46,000 FPC residential customers opted out of load management during the 1998 heat wave. This drop out translated to about 50 MW of Summer capacity. While over reliance on load management is a critical issue for FPC, we are also concerned with the extensive reliance on load management and other non-firm loads on a Peninsular Florida basis. On a Peninsular Florida basis, load management and other non-firm loads currently range from 44 to 58 percent of the reserve margin. The uncertainty as to what the reserve margin should be is exacerbated by the fact that a high percentage of the planned reserve margin is in the form of load management and other non-firm loads.

Winter 1999-2000 and winter 2000-01 have been previously identified as periods when the adequacy of state-wide reserves is uncertain. Since this facility is not expected to come on-line until approximately June 2001, it does not address these potential concerns.

Comments of Interested Persons

On November 30, 1998, the Electric Power Supply Association (EPSA) filed comments requesting that the Commission deny FPC's requested waiver. EPSA states "there is no assurance that Florida Power's construction will provide the best price for existing Florida ratepayers, who will, after Florida Power's proposed five year rate freeze, be asked to foot the bill for this project..." EPSA does not believe FPC can be assured of procuring the lowest cost reliable supply of energy absent a competitive solicitation. EPSA also believes FPC's proposal increases risk for FPC's ratepayers, exacerbates FPC's market power in the wholesale generation market and increases the possibility that FPC's ratepayers will subsidize FPC's participation in the competitive market.

On December 1, 1998, the Florida Industrial Cogeneration Association (FICA) filed comments. FICA states that Rule 25-22.082, Florida Administrative Code, was adopted at a time when the Commission amended its Cogeneration rules so that standard offers

would only be available to solid waste facilities and small cogenerators (ie., no more than 100kw). FICA claims the bidding rule was intended to provide opportunities for cogenerators to sell power to utilities. FICA believes the proposed waiver is contrary to long-standing federal and state policy. FICA also suggests the absence of competitive bidding for this resource addition could create "stranded costs" or otherwise burden the ratepayers.

Decision and Analysis

As detailed below, we deny FPC's request because we do not believe FPC has demonstrated that the lowest cost generation alternative will be selected by FPC. This is one underlying purpose of Section 403.519, Florida Statutes. Although it appears the proposed plant may represent a low cost supply of electricity and stands to increase FPC's reliability, FPC has not sufficiently demonstrated the unavailability of other equally reliable less costly utility or non-utility options. Therefore, FPC has not met the requirements of Section 120.542, Florida Statutes. Moreover, for the reasons discussed below, we also believe that it would not be in the public interest and would further be contrary to the intent of the bidding rule to approve the requested waiver.

We recognize that Peninsular Florida is facing generation reliability concerns and the proposed five year rate commitment has some potential benefit. However, the same result may be equally achieved via other utility and non-utility alternatives. It is unclear exactly how FPC would become aware of such proposals absent soliciting the market.

Rate Commitment

FPC's commitment to "not initiate any proceeding to increase its current base rates which includes the capital costs and non-fuel operating and maintenance expenses associated with Hines 2 for a period of at least five years from the unit's commercial operation date" has value, but it is limited. The company can still ask for a base rate increase through a limited proceeding for other items. The company further states that the "commitment is conditioned upon the understanding that these capital costs and non-fuel O&M expenses will be considered legitimate utility expenditures for surveillance reporting purposes when Hines 2 is placed in commercial operation." Under FPC's commitment, Hines 2

will be included for all earnings purposes except a full-fledged rate proceeding initiated by FPC. Earnings tracked by the Commission's surveillance program will include Hines 2. If any other party were to initiate a proceeding with FPC to review base rates, Hines 2 costs would also be included.

Purpose of Rule 25-22.082, Florida Administrative Code

FPC still must demonstrate the cost-effectiveness of Hines 2 relative to other alternatives during a need-determination proceeding. Recognizing this obligation, absent completing the RFP process, a utility undertakes an increased risk of having to prove the worthiness of its project during a need determination proceeding. In that situation, since the RFP process was not used to preclude likely intervenors and so-called eleventh-hour proposals, the utility and Commission alike stand to endure the same lengthy litigation experienced during the Cypress case¹.

The Cypress proceeding prompted in part the adoption of Rule 25-22.082, Florida Administrative Code. In that case, Florida Power & Light Company presented what it believed to be the most cost-effective generation alternative based on a limited selection process. Through the course of the proceeding, two additional projects contested FPL's choice and offered alternatives. The Commission expressed frustration that the limited selection process used by FPL to select Cypress did not facilitate the Commission's statutory responsibility to determine the most cost-effective generating unit under Section 403.519, Florida Statutes. In part the Commission stated:

In this case we find that FPL's selection process was less than optimal. FPL did not ensure that all interested parties had an equal opportunity to submit capacity proposals, but instead considered one project left over from a 1989 request for proposals (RFP) and 14 unsolicited proposed projects. As a result, FPL did not adequately consider all potential purchased power options. (Order page 16)

¹ Joint Petition to Determine Need by Cypress Energy Partners, L.P. and Florida Power and Light Company, Docket 920520-EQ, Order No. PSC-92-1355-FOF-EQ, issued 11/23/92.

Any non-utility generator, having seen the price in FPL's next need petition, will be able to intervene in the need proceeding and put a better price on the table. If a need is then denied because the proposed plant is not the most cost-effective alternative available, the process could repeat itself ad infinitum, with the need never being filled, and with more cost-effective alternatives presented at each successive need determination proceeding. (Order page 17)

While it is appropriate to review generation alternatives in a need determination, it is not the most optimal method of capacity selection. Much like FPL, FPC should consider the advantages of the RFP process and avoid the potential for eleventh-hour proposals and the possibility of an unsatisfied need. Doing so would allow FPC to identify and evaluate all capacity alternatives as well as reaching closure on the issue of cost-effectiveness during the need-determination process due to the intervention preclusion. We believe such an outcome is consistent with the intent of Rule 25-22.082, Florida Administrative Code, and more importantly, is in the public interest.

FPC previously requested a certification of need for the Hines 2 unit (formerly Polk Unit 3 and 4) in Docket 910759-EI. In Order No. 25550, we held that FPC indeed had a need to construct the first two of the four requested units but that a need for the last two was premature at that time. The granted need for the first two units came in part due to FPC having "evaluated ten alternative generating plans in its Integrated Resource Study. These plans included various generating technologies, as well as purchased power options from other utilities." (page 37) In addressing the final two units, now known as Hines 2, the Hearing officer stated:

At this time, I will not make a finding on how Florida Power should meet the needs of its third and fourth units. I will not require bidding for purchased power to avoid construction of these units for two reasons: the need for the third unit is not mature, and we have no policy or rules requiring bidding. However, Florida Power should reevaluate all of the options for meeting the needs of the third and fourth units before requesting certification in order to ensure that it chooses the most cost-effective option. (page 40)

But for the maturity of the need and the lack of a bidding rule, it is our belief the Hearing officer had every intention to require FPC to "reevaluate all of the options" before granting the second part of FPC's requested need. This requirement is still appropriate. According to its petition, FPC now believes that the need for the remaining two units is mature. Likewise, since 1994, this Commission has had a rule requiring bidding.

As a general matter of policy, we believe that bypassing the RFP process ultimately contributes to stifling the economic benefits of competitive generation in Florida. If in fact Hines Unit 2 is the most cost-effective alternative for FPC's ratepayers, this would be confirmed during the initial stages of the RFP process. However, if this is not the case, this too would be confirmed and the process will have worked as originally intended.

We also note that our decision rendered in this matter is, and must be, issued as proposed agency action. If the waiver request were granted, persons whose substantial interests are affected by the decision could request a hearing pursuant to Sections 120.569 and 120.57, Florida Statutes. This process could reasonably be expected to take between four and six months. This would, in large measure, eliminate any time advantage obtained via the waiver.

Moreover, Rule 25-22.082(8) Florida Administrative Code, precludes participation in the subsequent need determination proceeding by non-bidders in a RFP process. Granting the requested waiver would render that provision inapplicable, thus making the need determination proceeding potentially more complex.

Timing

Though presented as new information, it appears that FPC has known of its near-term need for additional capacity resources since the early part of this year. An RFP solicitation procedure takes about six to nine months to complete, thereby delaying the in-service date of a generating unit by at least one summer or winter peak demand season. This realization should have prompted FPC to start the RFP process at that point in time. Having done so, finalization would be very near complete and FPC would be concentrating its efforts on a determination of need instead of requesting the instant waiver.

FPC's current Ten Year Site Plan (TYSP) filed in April of 1998 indicated that its next planned generation addition, known as Hines 2, was a 487 MW combined cycle unit to be ready for commercial operation by November 2004. FPC's TYSP also indicated that it expected to drop below its 15 percent winter reserve margin criterion in the year 2000/01. FPC explained that it intended on covering this shortfall with short-term power purchases. FPC was also aware of the potential termination of the 75 MW Panda-Kathleen, L.P. standard offer contract.² Furthermore, it was negotiating with the City of Barrow in early May for, and has subsequently signed, a five year full-requirements power supply contract beginning in 1999.

With this information, we believe that FPC was aware during the early part of this year that additional capacity would be needed beginning in the year 2000. Nonetheless, placing Hines 2 into service in the Summer of 2001 will do nothing to increase FPC's capacity reserves during the Winter 2000/01.

For these reasons we deny FPC's request for a waiver of the requirements of Rule 25-22.082, Florida Administrative Code. This will assure that its ratepayers benefit from the most economical resource addition and to avoid the potential for extensive litigation during the later need determination process. Of the alternatives presented, we believe this is most consistent with the public interest. FPC has failed to demonstrate that the purposes of the underlying statute will be achieved by other means. Therefore, FPC has not met the requirements of Section 120.542, Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the comments of the Florida Industrial Cogeneration Association shall be accepted as timely. It is further

ORDERED that Florida Power Corporation's request for a waiver of the requirements of Rule 25-22.082, Florida Administrative Code, shall be denied.

² Florida Power Corporation notified the Commission on July 20, 1998 that it had officially terminated the standard offer contract with Panda-Kathleen, L.P. due to Panda Kathleen's failure to perform.

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ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective 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 or Judicial Review" 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 9th day of February, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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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 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.

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, 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 March 2, 1999.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

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.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date 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.