

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power Corporation for approval of an agreement with El Paso Power Services Company to restructure existing cogeneration contracts with Polk Power Partners, L.P. and Orange Cogeneration Limited Partnership.

DOCKET NO. 990723-EQ
ORDER NO. PSC-99-1956-PAA-EQ
ISSUED: October 5, 1999

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING AMENDMENTS TO AGREEMENT TO RESTRUCTURE
COGENERATION CONTRACTS

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. INTRODUCTION

On August 18, 1999, in Order No. PSC-1623-99-PAA-EQ, the Commission approved Florida Power Corporation's (FPC) petition for approval of an agreement with El Paso Power Services Company (El Paso). This order became final on September 14, 1999, with the issuance of Consummating Order No. PSC-99-1789-CO-EQ. The agreement will restructure and reduce the costs of existing cogeneration contracts between FPC and three Qualifying Facilities (QFs): 1) Royster Phosphates, Inc. (Royster); 2) Mulberry Energy Company (Mulberry); and 3) Orange Cogeneration LP (Orange).

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FPC-RECORDS/REPORTING

During the July 27, 1999, Agenda Conference, FPC explained that several conditions precedent to El Paso's obligation to close the transaction for which approval was sought remained to be satisfied. FPC further explained that it might be necessary to amend the agreement with El Paso in order to satisfy the obligations, particularly the restructuring of El Paso's financial arrangements with its partner in the project. FPC and El Paso subsequently amended the agreement. They informed the Division of Electric and Gas (EAG) of the amendments on August 23, 1999. FPC noted in its letter to EAG, that the changes contained in the Amendment have no effect on the analysis performed by FPC in support of its original petition for approval of the agreement with El Paso, nor on the analysis performed by the Commission staff leading to its recommending that we approve the agreement. FPC representatives met with staff on September 7, 1999, to discuss the Amendments. Staff advised FPL that several of the amendments required our approval pursuant to Rule 25-17.0836(2), Florida Administrative Code. On September 10, 1999, FPC filed its Petition for Determination that Amendment to Restructuring Agreement is not Material or, in the Alternative, for Approval of Amendment.

II. PROVISIONS OF RULE 25-17.0836, FLORIDA ADMINISTRATIVE CODE, AND PROVISIONS OF THE AMENDMENTS

Rule 25-17.0836, Florida Administrative Code, governs modifications to existing QF contracts. Section two states:

In order for a utility to recover its costs, Commission approval is required for a modification that affects the overall efficiency, cost-effectiveness or nature of the project. Such modifications include, but are not limited to, changes to contractual terms such as location, prime mover technology type, fuel type, performance requirements, contracted megawatt output, the timing of capacity payments, or amount of capacity payments.

Section three states:

Commission approval is not required for modifications explicitly contemplated by the terms of the contract or routine administrative changes. Such modifications include, but are not limited to, an assignment expressly authorized by the terms of the contract, typographical corrections, change of address for payments, or change of name of resident agent.

The Amendment modifies the agreement in the following respects:

1. Amends Article 5.2.1 allowing FPC to call on the capacity of either the Orange or Mulberry facilities, instead of having to call on the combined capacity of both facilities.
2. Amends Article 5.2.6 by shortening the notice period FPC must give for call energy to one hour when required to meet a Firm System Need for Energy, a term newly defined in section three of the Amendment.
3. Amends Article 10.3.3 by reducing the amount of liquidated damages cap by 10 percent.
4. Amends Exhibit A by correcting a typographical error in the 2006 capacity payment.
5. Amends Exhibit H clarifies language regarding the hours used in the calculation of the make whole credit. Adds language regarding the calculation of the make whole credit for a partial year.

III. ANALYSIS OF THE AMENDMENTS UNDER THE RULE

FPC states in its petition that the Amendment's changes do not affect "performance requirements" as stated in section two of the rule, and, therefore, that the amendments do not require Commission approval pursuant to Rule 25-17.0836, Florida Administrative Code. FPC argues that the standard for determining whether a contract modification requires Commission approval is one of materiality. FPC cites subsection (1)(a) of the rule which requires investor-owned utilities to notify staff of any contract modification, and to include in the notice "a statement indicating whether the modification is a material change." Section two of the rule, restated previously, identifies modifications that affect the "overall efficiency, cost-effectiveness or nature of the project" as requiring Commission approval. The rule then gives examples of such modifications. FPC argues that the modifications contained in the Amendment are minor in nature, and do not meet the provisions of section two of the rule.

On the contrary, we believe that modifications one, two, and three are performance oriented, and, therefore, that they require Commission approval. As described in the order approving the

agreement (Order No. PSC-99-1623-PAA-EQ), the Royster and Mulberry contracts are served by the 115 megawatt (MW) Mulberry facility, and the Orange contract is served by the 106 MW Orange facility. The original agreement provided that when FPC called on energy from these facilities, FPC was required to call on the combined capacity of both facilities.

1. Modification One

Modification one gives FPC the operational flexibility to call on the capacity of either the Orange or the Mulberry facilities, or both. This provision will give FPC the ability to utilize cheaper sources of power, if available, instead of calling on the entire capacity of both facilities. This modification also gives El Paso additional operational flexibility in dispatching the Orange and Mulberry facilities.

2. Modification Two

Modification two provides FPC added flexibility by shortening the notice period FPC must give El Paso for call energy to one hour, when required to meet a "Firm System Need for Energy." This new term is defined as a need by FPC to

avoid or mitigate the disruption in service to those demand side management customers on the Buyer's (FPC's) interruptible and curtailable service rate in a situation on the Buyer's electrical system in which, regardless of cause, all other demand side customers of lower service priority are experiencing disruptions.

It appears that this language provides FPC an opportunity for buy-through to prevent a disruption to interruptible and curtailable customers. This provision appears to classify residential load management customers as having a lower priority than commercial/industrial non-firm customers. Despite the title "Firm System Need for Energy", this provision does not appear to have any application to firm service. This modification gives FPC the flexibility to delay its decision to call on El Paso until FPC is reasonably certain that it must call on energy from El Paso to meet the "Firm System Need for Energy." The modification, however, does not affect the ability of FPC to provide firm service to its retail customers.

3. Modification Three

Modification three reduces the cap on the liquidated damages payable by El Paso to FPC by ten percent. FPC states in its petition that this provision is essential to El Paso's financial restructuring, and hence its ability to bring closure to the proposal. This provision does shift risk to FPC's ratepayers in the event El Paso does not perform according to the terms of the agreement. This change will have no impact on the capacity payment discounts, and will not impact the cost-effectiveness of the agreement.

4. Modification Four

Modification four is a typographical change which does not require Commission approval, pursuant to Rule 25-17.0836(3), Florida Administrative Code.

5. Modification Five

Modification five adds language regarding the calculation of the make whole credit for a partial year. FPC included the effects of this provision in the analysis of the savings the agreement is projected to provide to FPC's ratepayers. This modification does not require Commission approval because it was already considered in the original analysis.

IV. CONCLUSION

Modifications one, two, and three are performance oriented, but do not affect the overall cost-effectiveness of the agreement. FPC's ratepayers will realize significant capacity cost savings and are forecasted to realize energy savings pursuant to the agreement. These modifications may actually improve the cost-effectiveness of the agreement. The original agreement provides capacity payment discounts to the three QF contracts. This was the most significant factor in the agreement. These modifications do not in any way affect these discounts. FPC's ratepayers, therefore, can expect lower purchased power cost as a result of the agreement and the Amendment.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the amendments one, two and three to the restructuring agreement described and included in Florida Power Corporation's Petition for

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Determination that Amendment to Restructuring Agreement is not Material, or, in the Alternative, for Approval of Amendment are approved as described herein. It is further

ORDERED that provisions four and five to the restructuring agreement described and included in Florida Power Corporation's Petition for Determination that Amendment to Restructuring Agreement is not Material, or, in the Alternative, for Approval of Amendment are not material pursuant to Rule 25-17.0836, Florida Administrative Code, and do not require Commission approval. 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 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 5th day of October, 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

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, 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 26, 1999.

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.