

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of Strategic Analysis and Governmental Affairs (Sickel)
Office of the General Counsel (Hartman)
Division of Economic Regulation (Kummet)

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ASB
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RE: Docket No. 080501-EI – 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. 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.

AGENDA: 08/18/09 – Post-hearing Agenda – Participation is Limited to Commissioners and Staff only

COMMISSIONERS ASSIGNED: McMurrian, Edgar, Argenziano

PREHEARING OFFICER: Argenziano

CRITICAL DATES: 90-Day Deadline Waived

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\SGA\WP\080501.RCM.DOC

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Case Background

Since January 1, 2006, each electric investor-owned utility (IOU) has been required to continuously offer to purchase capacity and energy from specific types of renewable sources. Section 366.91(3), Florida Statutes (F.S.), specifies that the contracts for purchase must be based

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on the utility's full avoided costs as defined in Section 366.051, F.S., and provide a term of at least 10 years. Rules 25-17.200 through 25-17.310, Florida Administrative Code (F.A.C.), implement the statutes.

On April 1, 2008, Progress Energy Florida, Inc. (PEF or Company) filed its petition requesting the Commission's approval of a standard offer contract and associated tariffs based on the Ten-Year Site Plan for 2008-2017.¹ Pursuant to PEF's expansion plan, a single type of fossil fueled unit was available to serve as an avoided unit: a combined cycle unit to be located at Suwannee which was expected to come into service in June 2013.

On July 23, 2008, PEF filed a motion to withdraw its initial standard offer contract and COG-2 rate schedule that had been filed on April 1, 2008, in Docket No. 080187-EQ.² Accordingly, Commission staff withdrew the recommendation that had been filed in that docket.

On July 15, 2008, PEF filed a petition for rule waiver and approval of a standard offer contract which opened this docket. In that filing, the Company explained that a request for proposals (RFP) had been issued for the Suwannee combined cycle unit. PEF also indicated that it did not have an upcoming planned purchase in its Ten-Year Site Plan. PEF requested that the Suwannee combined cycle unit serve as the avoided unit although it was no longer reflected in the Company's Ten-Year Site Plan.

By Order No. PSC-08-0706-TRF-EI, issued October 23, 2008, the Commission approved PEF's petition for the second proposed standard offer contract and associated tariffs filed on July 15, 2008, and found that they were in compliance with Rules 25-17.200 through 25-17.310, F.A.C. Order No. PSC-08-0706-TRF-EI is attached to this recommendation as Attachment A. PCS Phosphate did not challenge the Commission's grant of the rule waiver.

On November 13, 2008, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (PCS Phosphate) timely filed a petition for formal hearing. The formal hearing was held April 16, 2009. Post hearing briefs were filed May 18, 2009.

Previously, PCS Phosphate had filed a timely protest to PEF's 2007 standard offer contract in Docket No. 070235-EQ. PEF and PCS each filed testimony in that docket. A hearing in that matter was continued in light of the filing of PEF's 2008 standard offer contract. Docket No. 070235-EQ remains open and the testimony submitted in that docket has been re-filed as exhibits in Docket No. 080501-EI.

This recommendation addresses the issues and evidence presented at the April 16, 2009 hearing. The Commission has jurisdiction over this matter pursuant to Sections 366.04 through 366.06, 366.91 and 366.92, F. S.

¹ See Docket No. 080187-EQ, In re: Petition for approval of amended standard offer contract and COG-2 rate schedule, by Progress Energy Florida.

² PEF's withdrawal of its initial standard offer contract was acknowledged by Order No. PSC-08-0695-FOF-EQ, issued October 20, 2008.

Discussion of Issues

Issue 1: Is the standard offer contract filed by PEF on July 15, 2008 in compliance with Rules 25-17.200 through 25-17.310, F.A.C.?

Recommendation: Yes. If the Commission approves staff's recommendation, any changes agreed to by the parties in their post-hearing briefs should be incorporated in PEF's standard offer contract filed in Docket No. 090162-EQ. (Sickel)

Position of the Parties

PEF: Yes. PEF has demonstrated in this case that its standard offer contract complies with the Commission's Standard Offer Contract Rules 25-17.001 through 25-17.310, F.A.C.

PCS Phosphate: No. PEF's proposed standard offer contract contains terms and conditions that violate both the express requirements of the Commission's regulations and policy directives of Rule 25-17.200, F.A.C. and therefore does not comply with the relevant Commission regulations.

Staff Analysis:

PARTIES' ARGUMENTS

PEF believes that the record in this case demonstrates that the Company's standard offer contract is reasonable and in compliance with Rules 25-17.200 through 25-17.310, F.A.C. (PEF BR 1) PEF explains that the terms of the standard offer must be broad and generalized to apply to all renewable suppliers and qualifying facilities, while at the same time PEF is obligated upon execution of a standard offer contract, without any negotiation. (PEF BR 1-2) Implementation of the eight changes proposed by PCS Phosphate would cause financial harm to the customers of PEF, and customers would not get the full value of what they would be paying for. (PEF BR 2)

In its brief, PCS Phosphate states that Rule 25-17.200, F.A.C., makes explicit that the purpose of the standard offer is to further Florida's renewable energy goals. (PCS Phosphate BR 5) PCS Phosphate proposes that the following eight contract terms must be revised to bring the standard offer contract proffered by PEF into compliance with Rules 25-17.200 through 25-17.301, F.A.C.:

- (1) appropriate performance characteristics of the avoided unit
- (2) right of first refusal for purchase of renewable energy credits
- (3) use of interruptible power to meet start up requirements
- (4) the number of capacity tests
- (5) the capacity testing period
- (6) arrangements for maintenance outage
- (7) retention of performance security by the utility
- (8) symmetrical credit and collateral provisions

PCS Phosphate believes that the proposed changes will remove unnecessary barriers to the development of renewable generation and minimize the need for potential renewable energy providers to expend resources in an effort to achieve equitable terms and conditions. (PCS Phosphate BR 6-7)

The eight modifications proposed by PCS Phosphate are addressed below.

(1) Appropriate performance characteristics of the avoided unit:

PARTIES' ARGUMENTS

PEF must accept power from the renewable generator whenever the facility is on-line. (TR 47) As a result, the capacity factor of the renewable generator is essentially the availability of that unit and is compared with the availability factor of the avoided unit. (PEF BR 3) PEF's standard offer contract would pay a renewable generator full capacity payments for achieving a capacity factor of 89 percent and would reduce capacity payments on a sliding scale down to a minimum performance level of a 69 percent capacity factor. Below the minimum threshold capacity factor provided in the contract, the renewable supplier is not really supplying the capacity necessary to avoid PEF's next unit. (TR 47-48)

PCS Phosphate argues that the terms "availability factor" and "capacity factor" are distinctly different measures of unit performance and claims that PEF is using these terms interchangeably "in order to require a level of performance from a renewable energy provider that is virtually impossible to achieve." (PCS Phosphate BR 19) Further, PCS Phosphate claims that PEF requires the renewable generator to meet standards that differ from the anticipated performance of the avoided unit, in violation of Rule 25-17.0832(4)(e)(8), F.A.C. (PCS Phosphate BR 19-21) PCS Phosphate observes that existing combined cycle units operated by PEF have "achieved" average capacity factors in the 40 percent to 50 percent range (TR 96, PCS Phosphate BR 21) and recommends that the capacity factor should be a matter negotiated by the parties.

ANALYSIS

The standard offer contract is required by statute to provide compensation to the renewable provider based upon the utility's avoided cost. The avoided cost for any future generating capacity cannot be determined from the operating records of existing generating units. (TR 48) The historical capacity factors for any units in service are determined by economic dispatch, which is dependent upon many factors including weather, fuel costs, heat rates, etc. Further, the operating history of existing units does not define the manner of dispatch or the costs that will actually develop after the next generating unit is built.

The projected availability of the planned unit is a performance benchmark. If the next planned generating unit is expected to have an 89 percent availability, the unit would be expected to be able to generate at 100 percent capability up to 89 percent of the time. (TR 32) The 89 percent availability is derived from careful assessment of such factors as the life cycle of various mechanical components and known requirements for maintenance associated with the type of

unit. The intent of the standard offer contract is to require the renewable generator to operate in a manner similar to the utility's avoided unit. If a utility-owned generating unit were not constrained by economic dispatch parameters, then the unit's availability and capacity factor would be equivalent.

Under the standard offer contract, PEF must accept power from the renewable generator whenever the facility is on-line. (TR 47) When a renewable generator provides electric power, the measure of the service provided is the energy produced, measured in kilowatt-hours, which can be used to calculate a capacity factor. The utility is not able to "call upon" or economically dispatch a renewable provider. Owners of renewable generators typically seek to maximize payments through maximized energy production. Therefore, the capacity factor and the availability factor of the renewable generator are virtually the same and can be compared to the availability factor of the avoided unit.

PCS Phosphate witness Marz testifies that the availability factor of the avoided unit is 89 percent and the anticipated capacity factor is 65.3 percent based on PEF's 2009 Ten-Year Site Plan. He concludes that PEF requires performance better than that of the avoided unit for any level of capacity payment. Witness Marz contends that the standard offer contract imposes an unreasonable standard upon renewable generators. (TR 97) The resulting capacity factor that appears in a Ten-Year Site Plan is a calculation based on the availability performance benchmark as well as projected values of many other factors such as fuel prices and load forecasts. Thus, the estimate of capacity factor that appears in the Ten-Year Site Plan does not serve as a benchmark, because the underlying factors are highly variable. In other words, if an economic dispatch were modeled today, the resulting capacity factor could be higher or lower, but the availability of the avoided unit would remain at 89 percent. The only performance benchmark is the projected availability factor. As discussed above, the intent of the standard offer contract is to require the renewable generator to operate in a manner similar to the utility's avoided unit. The capacity factor and the availability factor of the renewable generator are virtually the same and can be compared to the availability factor of the avoided unit.

If the renewable generator is available for 89 percent of the time, the operation of the renewable generator is approximating the avoided unit and the renewable provider should be compensated accordingly. (TR 32) PEF's 2008 standard offer contract would pay the renewable generator the full capacity payment if the renewable generator achieved an 89 percent capacity factor. (TR 32) While not required by Commission rules, providing an opportunity to receive reduced capacity payments for performance that is below that of the avoided unit is often referred to as a sliding scale. (TR 48) PEF has included a minimum threshold level of a 69 percent capacity factor to receive capacity payments. While this value is arbitrary, it serves to provide the renewable generator with a partial capacity payment if the renewable generator's performance falls below that of the utility's avoided unit.

PCS Phosphate has stated that renewable energy production may depend on other considerations including a manufacturing schedule. (EXH 3, p.3) PCS Phosphate further stated that many variables, including the electrical needs of the renewable facility, will influence the operation and availability of the renewable generator. (EXH 3, p.4) The standard offer contract is based on replacing utility-owned capacity with similar capacity from a renewable supplier.

The Commission is required, by statute, to provide compensation to the renewable provider based upon the utility's avoided cost; not the cost of power produced by the renewable generator. The changes to the standard offer contract that are proposed by PCS phosphate appear to staff to be a major departure from the concept of paying avoided costs for similar capacity.

CONCLUSION

Staff recommends that the sliding scale for capacity payments in PEF's 2008 standard offer contract should be approved.

(2) Right of first refusal to purchase renewable energy credits:

ANALYSIS

As stated in their briefs, the parties agree that provisions relating to renewable energy credits should be revised. Standard offer contracts should not include the right of first refusal for renewable energy credits. (PEF BR 4-5; PCS Phosphate BR 10-11) Therefore, this issue is moot.

(3) Use of interruptible power to meet startup requirements:

PARTIES' ARGUMENTS

Section 6.3 of PEF's standard offer contract prohibits a renewable provider from relying on interruptible standby service to enable start up of the renewable generator. In an event where PEF was interrupting customers in order to reduce load, the value of generation from PCS Phosphate would be lost if that facility were interrupted and could not restart due to lack of grid power. (TR 11, 35)

PCS Phosphate agrees with PEF that interruptible standby service could expose the utility and its customers to a risk of not receiving generating capability that the customers have paid for. (TR 116-118) However, PCS Phosphate says that no tariff provision prevents an interruptible customer from drawing power to start its generator. (PCS Phosphate BR 12-13) PCS Phosphate claims it currently purchases the majority of its standby electrical energy under the Rate SS-2. (TR 111, PCS Phosphate BR 12-13)

ANALYSIS

PCS Phosphate claims that no tariff provision prevents a customer from drawing power to start a generator during a power interruption. (PCS Phosphate BR 12-13) However, such a claim is not consistent with Special Provision 2 of the SS-2 tariff, found on Sheet No. 6.318, which requires that interruptible equipment will be installed. The SS-2 tariff is available on a first call basis, and the required equipment is subject to availability. If an interruption is needed for reliability, it is executed by use of the special equipment installed, with the result that no power is available on the customer's side of that equipment. Witness Gammon comments that "the generating unit could not return to service because it would not have power from PEF." (TR

35) The lack of available power for startup would be a matter of function rather than a matter of tariff prohibition. There is no provision for some alternate connection to get around the equipment that is used to accomplish an interruption of electric service when reliability issues demand an interruption.

Witness Marz testifies that “PCS purchases interruptible standby service for existing on-site generation.” (TR 111) The witness goes on to say that if interruptible standby service is provided to a renewable generator, this arrangement for service will subject the body of ratepayers to a risk that the contracted capacity would not be available when needed to alleviate a generation shortage. (TR 117-118) Under the Commission's rules currently in force, the standard offer contract utilizes the next planned generator as a performance benchmark to assure “equal pay for equal performance” and so guard the interests of the ratepayer. Staff believes that the interruptible standby service is intended as an option for self-service generators who may sell excess energy on an as-available basis, rather than for generators selling firm power pursuant to a standard offer contract. In the view of staff, the testimony of PCS Phosphate witness Marz is describing a generation asset operated in a manner which does not match to the requirements of a standard offer contract under Rule 25-17.250, F.A.C. (TR 98, 111)

CONCLUSION

Staff recommends that Section 6.3 of PEF's 2008 standard offer contract complies with Rule 25-17.250, F.A.C., and is appropriate as to prohibition of interruptible standby service.

(4) Number of capacity tests:

ANALYSIS

The parties have reached agreement regarding arrangements for capacity testing if there is good cause. PCS Phosphate accepts the revised Section 7.4 as provided by PEF witness Gammon in his rebuttal testimony. (TR 136-137, PCS Phosphate BR 13-14) Staff therefore recommends that this provision be incorporated in PEF's standard offer contract filed in Docket No. 090162-EQ.

(5) Period for capacity testing:

PARTIES' ARGUMENTS

The 24-hour test period required by PEF is less than the reliability testing that would be required of the avoided unit. PEF points out that the renewable facility is obligated to ensure that it is capable of producing power in a manner equivalent to the avoided unit, at all times. (PEF BR 6-7)

PCS Phosphate seeks to revise the requirements in the standard offer contract to provide flexibility as to the time period for the committed capacity test. (TR 101-102, PCS Phosphate BR 14-15) The expectation of PCS Phosphate is that the standard offer contract will be changed so that various renewable providers can execute the contract with minimal resources invested in negotiation. (TR 15) PCS Phosphate explains that if the standard offer contract requires that

renewable providers match the operating characteristics of a gas combined cycle generator, the development of alternative technologies will be excluded rather than encouraged. (TR 15-17) PCS Phosphate offers the power purchase agreement between PEF and Vandolah Power as an example of a successful agreement relating to the incorporation of limited discretion to set testing periods. (TR 102, PCS Phosphate BR 14-15)

ANALYSIS

PEF witness Gammon testifies that PEF's standard offer contract sets the test period for establishing the renewable generator's capacity to ensure that PEF's customers receive all the capacity that they have contracted to purchase. (TR 36) The 24-hour test period required by PEF is less than the reliability testing that would be required of the avoided unit. Witness Gammon testifies that if a renewable supplier cannot generate for 24 hours, the supplier is not avoiding the planned unit. (TR 51) If the renewable technology is unable to achieve a specified committed capacity over a 24-hour test period, it cannot serve to replace that specified capacity portion of the avoided unit. The typical planned unit is able to run for several days at 100 percent capacity. PCS Phosphate claims that varying operating characteristics of renewable generators must be integrated into the standard offer contract and seeks to revise the requirements in the standard offer contract to provide flexibility as to the time period for the committed capacity test. (TR 101-102)

Staff agrees with PCS Phosphate that the standard offer contract does not bridge the gap between the operating characteristics of renewable generators and the generation units planned by a utility. If the renewable generator's technology is able to match the performance and costs of the avoided unit, the utility would likely opt for the renewable technology and thereby obtain additional benefits, such as might accrue from smaller units widely distributed close to load centers. While the development and support of renewable generating technologies underlie Sections 366.91 and 366.92, F.S., as well as Rule 25-17.250, F.A.C., the rules and regulations also require that the provisions of the standard offer contract must be designed so as to not compromise the principle of providing reliable service at least cost. The information provided in the standard offer contract does support the development of renewable technologies by acting as a benchmark for performance. A negotiated contract can provide accommodation for varying performance, illustrated by the Vandolah contract. (TR 102). This includes shorter periods for generating committed capacity. However, replacing the terms of the standard offer with terms excerpted from various negotiated contracts would distort the information in the contract and render it inaccurate with regard to essential factors. The complaints listed by PCS Phosphate do not lead to a conclusion that an abbreviated period is sufficient for a committed capacity test.

CONCLUSION

The committed capacity test required by a standard offer contract should be based on the performance of the avoided unit, and matched to the avoided cost associated with that performance. The provisions of PEF's standard offer contract are in compliance with this requirement.

(6) Allowance for maintenance outage:

PARTIES' ARGUMENTS

Section 10.2 of PEF's standard offer contract provides for 15 days of scheduled maintenance outage per year, based on the allowance for maintenance of the avoided unit. (TR 137-138)

PCS Phosphate believes that the 15-day allowance for maintenance is unduly restrictive and not justified by the Commission's regulations. (PCS Phosphate BR 15-16)

ANALYSIS

The maintenance period is one of the performance standards associated with each specific generating unit. Rule 25-17.0832(4)(e)8, F.A.C., provides that minimum performance standards of the renewable generator shall approximate the performance standards relating to the avoided unit.

PEF explained that allowing an additional 15 days outage, as requested by PCS Phosphate, means that replacement power must be obtained for those 15 days. The costs for replacement power would be borne by PEF's customers. (PEF BR 7) PEF essentially claims that the customers pay for power for 350 days throughout the year under the standard offer provisions, although PCS Phosphate wants the maintenance allowance changed so that power would only be required for 335 days. (PEF BR 7)

PCS Phosphate claims that the 15-day allowance may be unduly restrictive because it may not be sufficient to perform the essential maintenance on the renewable provider's equipment. (PCS Phosphate BR 15-16) Witness Marz testifies that PEF's requirement is one-sided and not responsive to the specific circumstances of renewable energy producers. (TR 110)

The projected outage for the avoided unit appears reasonable in the view of staff. The Commission is required, by statute, to provide compensation to the renewable provider based upon the utility's avoided cost; not the cost of power produced by the renewable generator. Staff believes that extending the allowance for permitted maintenance outage as requested by PCS Phosphate would not be in accord with Commission rules just cited. As previously stated, this provision means that the standard offer contract utilizes the next planned generator as a performance benchmark to assure "equal pay for equal performance," and so guard the interests of the ratepayer.

CONCLUSION

The arrangements for maintenance provided by a standard offer contract should be based on the maintenance requirements of the avoided unit. PEF's contract provides for 15 days of scheduled maintenance per year, which is based on PEF's avoided costs.

(7) Concerning the performance security retained:

PARTIES' ARGUMENTS

Section 11.1 of the standard offer contract requires a performance security from renewable generators that will be in place for the life of the contract. PEF states that, without performance security retained for the term of the contract, the general body of ratepayers will bear all risk relating to a possibility that the renewable generator might not deliver capacity and energy as specified in the contract. (PEF BR 8)

PCS Phosphate acknowledges that the renewable producer is required to provide security in the event that the renewable supplier fails to deliver firm capacity and energy in the amount and time specified in the contract. (TR 105) PCS Phosphate claims that the termination fee is a separate fee that protects the PEF ratepayers in a case of poor performance by a renewable supplier, and explains that the termination fee may be assessed to a renewable supplier in default. (PCS Phosphate BR 9) PCS Phosphate believes that completion security is to be returned upon successful completion of the capacity test and that PEF should post a bond if the credit rating drops to a certain level. (TR 124-127)

ANALYSIS

In his testimony, PCS Phosphate witness Marz provided an assessment of risks, and the management of those risks, involved with a renewable generator operating under a standard offer contract. The risk assessment and management proffered by witness Marz differs from the risks to ratepayers recognized and managed by the provisions of Rule 25-17.0832, F.A.C.

The provisions of Rule 25-17.0832, F.A.C., recognize and address three distinctly different risks associated with power purchase contracts. The first risk is associated with a possibility that the renewable provider enters into a contract, but is then unable to make available the committed capacity and energy by the date specified in the contract. This risk relates to the completion security provided by Rule 25-17.0832(4)(f)1, F.A.C. Upon timely demonstration that the renewable supplier has achieved the capability to deliver capacity and energy as specified in the contract, the rule directs that the completion security should be returned to the renewable provider, if it has been required in association with the execution of the contract. (TR 105)

The second risk relates to performance by the renewable provider, after successful completion of the capacity test, for the duration of the contract. Staff agrees with PEF witness Gammon that performance security is required throughout the term of the contract and is not finished when the capability of the renewable generator is originally demonstrated. (TR 55) If a renewable provider is unable to comply with contractual performance requirements at a time of high demand, the utility may be forced to purchase energy in order to serve load. If a purchase of replacement energy becomes necessary, the incremental cost of the purchase would be subject to recovery from the retained performance security. Without the retained performance security, the risk associated with the additional cost of the purchase falls to the ratepayer. The provisions of Rule 25-17.0832(3)(d), F.A.C., apply to this situation, and are included in the standard offer

contract by Rule 25-17.0832(4)(b), F.A.C. Section 11 of PEF's standard offer contract provides for performance security, in accordance with the rule.

The performance security may differ from completion security, in terms or arrangements. For example, cash may be required for completion security while a bond is permitted for performance security. Upon satisfactory performance in the committed capacity test, the special requirements of the completion security are no longer needed. In the instant case, the completion security is the same as the performance security. Section 11 in the standard offer contract proffered by PEF has a single security provision which is called "Completion/Performance Security," to be undertaken by the renewable provider at the time conditions precedent are satisfied and remain through the term of the contract. (PEF BR 7-8) Staff recognizes no separate completion security, to be returned upon satisfactory completion of the capacity test by the renewable generator.

The third risk is associated with optional payment streams, whereby the renewable provider selects one of the early payment options available. Rule 25-17.0832(4)(e)10, F.A.C., requires a surety bond or equivalent to assure repayment of any energy or capacity payments that exceed the year's annual value of deferring the avoided unit. Rule 25-17.0832(3), F.A.C., provides multiple options for early payment, subject to the constraint that the cumulative present worth of payments made by PEF for capacity and energy must not exceed the cumulative present worth of the year-by-year deferral associated with the avoided unit. The early payment options create a deficit compared to the value of deferral, and that deficit is gradually extinguished over the term of the contract. The standard offer contract provides for termination security that is directed at remedy of any deficit created by early capacity payments, in the event of default during the term of the contract. (TR 40)

Creditworthiness provisions are offered by PCS Phosphate witness Marz as a means to provide performance security in case of default by the renewable provider. (TR 124-126) Staff recommends that the view of witness Marz is not in accord with the provisions of Rule 25-17.0832, F.A.C. In a worst case scenario where a renewable provider would default, the provisions set out in the rules of the Commission protect the ratepayer through a process that recovers damages in a simple and direct manner, under the jurisdiction of the Commission. An effort to liquidate damages based on a previous assessment of creditworthiness would likely involve assets not under the jurisdiction of the Commission. The effort could entail extended court proceedings and increase both costs and risks borne by the ratepayer.

CONCLUSION

Rule 25-17.0832(3)(d), F.A.C., requires completion and performance security throughout the term of the contract. Staff recommends that if the same security serves for completion and performance, it must continue throughout the term of the contract.

(8) Symmetrical credit and collateral provisions:

PARTIES' ARGUMENTS

PEF is obligated to sign the standard offer contract with any renewable provider who is willing to accept the terms of the contract. (PEF BR 8) PEF observes that the suggestion by PCS Phosphate to add a provision requiring PEF to post a bond (if the credit rating of the utility drops) would merely add a financial burden on PEF's customers because PEF is mandated by rules and regulations to pay for the power it receives. (PEF BR 8-9)

PCS Phosphate believes that the standard offer contract constitutes one-sided treatment of potential renewable providers, inflicting prejudicial and disproportionate treatment. (PCS Phosphate BR 16-17) The brief cites the power supply agreement with the city of Mount Dora to demonstrate that the proposed reciprocal creditworthiness provisions have been acceptable to PEF. (TR 106, PCS Phosphate BR 18)

ANALYSIS

PCS Phosphate witness Marz testifies that default provisions apply only to the renewable provider. The witness stated, "There are no provisions that permit the renewable producer to declare a default by PEF." As an example, the witness describes a hypothetical situation where PEF could stop paying a renewable, and the renewable would have no contractual right to declare PEF in default. The renewable provider must continue to provide power or risk being declared in default by PEF. (TR 106-107) Witness Marz notes that approval of the contract by the Commission only guarantees recovery of the cost of the contract by PEF, while the renewable producer must assume risk of non-performance by PEF. (TR 108) In his testimony filed February 18, 2008, witness Marz lists seven circumstances that can give rise to a default situation: (1) failure to make timely payment; (2) false or misleading representation or warranty; (3) failure to perform any obligation; (4) bankruptcy of a party; (5) failure to satisfy creditworthiness provisions; (6) merger or consolidation without assumption of prior obligation; and (7) breach by a guarantor. (TR 107) The brief mentions that in case of dispute not resolved by executives, the standard offer contract specifies binding arbitration. (PCS Phosphate BR 17) Witness Marz suggests that PEF should be required to post a bond if the utility's credit rating drops below a certain level. (TR 126) Witness Marz also testifies that PEF's ratepayers would bear the costs of such credit security. (TR 126-127)

As a regulated utility, PEF operates under Commission oversight. PEF is obligated to sign the standard offer contract with any renewable provider who is willing to accept the terms of the contract. Further, PEF is mandated to pay for the power it receives from the renewable provider. (PEF BR 8) The credit ratings of regulated companies are monitored by Commission staff. While the future cannot be guaranteed, intervention by the Commission would be expected long before a regulated utility became involved in a situation of decline that might result in default on contractual payment obligations. Mergers and activities with affiliates can obscure problems that presage default, but the Commission seeks to forestall problems through diligent regulatory oversight. Cost recovery proceedings are conducted annually to insure prompt recovery of prudently incurred costs. In contrast, the Commission has no jurisdictional authority

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over a non-regulated provider and no means of direct influence over any decisions or actions by that entity, other than by oversight of the contractual arrangements that may impact a utility's ratepayers.

CONCLUSION

Staff finds no support in the record for a proposal that PEF should be required to post bond as a security for capacity or energy payments that are obligated under the standard offer contract.

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

Recommendation: No. As discussed in Issue 1, including the changes suggested by PEF in its post hearing comment, the standard offer contract filed by PEF on July 15, 2008 is in compliance with Rules 25-17.200 through 25-17.310, F.A.C. (Sickel)

Position of the Parties

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.

PCS Phosphate: Yes. PEF's standard offer contract is inconsistent with the Commission's regulations because it imposes incorrect performance requirements, fails to include all costs associated with the avoided unit, wrongly retains a renewable generator's performance security, and improperly burdens the ownership rights to Renewable Energy Credits.

Staff Analysis: In its position on Issue 2, PCS Phosphate lists four items of concern. Three of those concerns relate to terms and conditions which were addressed in Issue 1. Refer to Issue 1 for analyses and conclusions relating to performance requirements (item 1); the right of first refusal for purchase of renewable energy credits (item 2); and performance security retained by the utility (item 7). The remaining concern regarding evaluation of costs associated with the avoided unit is addressed in this issue.

PARTIES' ARGUMENTS

PEF witness Gammon explains that the avoided costs are calculated in accordance with the formula and requirements in Rule 25-17.0832(6), F.A.C. He explains how some of the factors are evaluated and values obtained. Witness Gammon testifies that the methodology is unchanged for a number of years. (TR 31-32)

In its brief, PCS Phosphate states that the calculation of avoided costs by PEF is inaccurate because it does not include all of "the incremental costs to the facility" including the costs relating to engineering and design of the facility, as well as interconnection and transmission costs. (PCS Phosphate BR 23) PCS Phosphate says that PEF calculated the avoided cost payment from data in the Ten-Year Site Plan and failed to identify either total projected facility cost or cost components. (PCS Phosphate BR 23)

ANALYSIS

The basis and methods of cost projection used in the pending matter appear similar to the cost projections that have been utilized for previous contracts, both negotiated and standard offer contracts, by various utilities over the years. (TR 31-32) The appropriate values of the parameters shown on Schedule 2 of COG-2 were included in the filing for both 2007 and 2008. In comparing the values for the parameters in year 2007 with those in year 2008, the variation appears reasonable. The components themselves were not called into question and scrutinized during discovery. Staff finds no basis for a conclusion that the cost projections are seriously

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flawed. The claim by PCS Phosphate that some incremental costs are omitted from the costs associated with the avoided unit is not supported in the record.

CONCLUSION

Staff finds no support for a claim of inaccuracy as to calculation of avoided costs in the Rate Schedule COG-2 filed by PEF. Staff recommends that the payment schedules included in PEF's standard offer contract are valid based on the assumptions stated, and provide typical or approximate payments that could be expected by a renewable provider.

Issue 3: Do the non-price terms and conditions of PEF's standard offer contract that are specifically addressed by Florida Statutes or 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.?

Recommendation: Yes. As discussed in Issue 1, the non-price terms and conditions relating to the use of interruptible power, the capacity testing periods, the arrangements for maintenance outage, and the credit and collateral provisions are in compliance with Section 366.91, F.S., and Rules 25-17.001 and 25-17.200, F.A.C. (Sickel)

Position of the Parties

PEF: Yes.

PCS Phosphate: No. The provisions concerning the use of interruptible power, the number of capacity tests, the capacity testing periods, planned maintenance outage period and credit and collateral are not consistent with Florida's statutory and regulatory policies toward renewable energy because they are unwarranted, onerous and one-sided.

Staff Analysis: The concerns regarding non-price terms and conditions, itemized by PCS Phosphate in its position on this issue, have been addressed in Issue 1. In summary, interruptible standby service is not appropriate for a renewable generator operating under a standard offer contract. (TR 35) This would impose additional and unnecessary risk to the body of ratepayers. The required capacity test period of 24 hours and the allowance of 15 days of scheduled maintenance outage per year are based on the performance of the avoided unit and is in compliance with Rule 25-17.0832(4)(e)8, F.A.C. (PEF BR 6-7) Staff found no support in the record for a proposal that a utility should be required to post bond as a security for capacity or energy payments that are obligated under the standard offer contract.

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

Recommendation: Yes. As discussed in Issues 1 and 2, the evaluation of avoided costs in PEF's 2008 standard offer contract is in compliance with Rules 25-17.200 through 25-17.310, F.A.C. (Sickel)

Position of the Parties

PEF: Yes.

PCS Phosphate: No. The proposed performance standards do not properly differentiate between "availability factor" and "capacity factor," and do not distinguish between on-peak and off-peak performance. Also, PEF's calculation of the capacity payment fails to include all incremental costs of the avoided unit.

Staff Analysis: The concerns relating to the definitions and use of the terms "availability factor" and "capacity factor" were addressed in Issue 1, (item 1). As recommended in Issue 1, staff believes that PEF's standard offer contract uses the availability factor and the capacity factor in a meaningful and appropriate manner to rationally assess the cost for capacity and energy avoided as a result of the renewable generator's contribution to grid power. (TR 47-49)

As discussed in Issue 2, the costs related to the avoided unit were determined using the same methodology that has been used for a number of years and were calculated using the formula in Rule 25-17.0832(6), F.A.C. (TR 31-32)

Staff recommends that the estimates of value of deferral payments, based on avoided costs associated with the avoided unit, are calculated in an appropriate manner and are reasonable. The methodology for determining an RF/QF's capacity payments is in compliance with Rules 25-17.200 through 25-17.310, F.A.C.

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Issue 5: Should Docket No. 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 PEF, be closed?

Recommendation: Yes. Docket No. 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 PEF, should be closed. (Hartman, Sickel)

Position of the Parties

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

PCS Phosphate: Given the Commission's acceptance into the record of this proceeding of the Direct Testimony of Martin J. Marz, yes.

Staff Analysis: Previously, PCS Phosphate had filed a timely protest to PEF's 2007 standard offer contract in Docket No. 070235-EQ. PEF and PCS each filed testimony in that docket. A hearing in that matter was continued for purposes of administrative efficiency, at PCS Phosphate's request and without PEF's objection, without date in light of the filing of PEF's 2008 standard offer contract. Docket No. 070235-EQ remained open and the testimony submitted in that docket was later re-filed as exhibits in Docket No. 080501-EI. Staff therefore recommends that Docket No. 070235-EQ be closed.

Issue 6: Should this docket be closed?

Recommendation: Yes. As PEF has already filed its 2009 renewable energy tariff and standard offer contract, and in the interest of administrative efficiency, the Commission should direct PEF to file within 30 days of the Commission's vote at the Agenda Conference, a revised 2009 renewable energy tariff and standard offer contract in accord with the Commission's decision herein. (Sickel, Hartman)

Position of the Parties

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 No. 090162-EQ.

PCS Phosphate: This docket should be closed following Commission review and acceptance of all standard offer contract revisions required by the Commission's order in this docket.

Staff Analysis: This docket should be closed. As PEF has already filed its 2009 renewable energy tariff and standard offer contract, and in the interest of administrative efficiency, the Commission should direct PEF to file within 30 days of the Commission's vote at the Agenda Conference, a revised 2009 renewable energy tariff and standard offer contract in accord with the Commission's decision herein.

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-EI ORDER NO. PSC-08-0706-TRF-EI ISSUED: October 23, 2008
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The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING WAIVER OF
RULE 25-17.250(1) and (2)(a), FLORIDA ADMINISTRATIVE CODE
AND
ORDER APPROVING STANDARD OFFER CONTRACT AND ASSOCIATED TARIFFS

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 (F.A.C.).

Background

Since January 1, 2006, each electric investor-owned utility (IOU) has been required to continuously offer to purchase capacity and energy from specific types of renewable sources. Section 366.91(3), Florida Statutes (F.S.), specifies that the contracts for purchase must be based on the utility's full avoided costs as defined in Section 366.051, F.S., and provide a term of at least ten years. Rules 25-17.200 through 25-17.310, F.A.C., implement the statutes.

On April 1, 2008, Progress Energy Florida, Inc. (PEF or Company) filed its petition requesting our approval of a standard offer contract and associated tariffs based on the Ten-Year

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Site Plan for 2008-2017.¹ Pursuant to PEF's expansion plan, a single type of fossil fueled unit was available to serve as an avoided unit: a combined cycle unit to be located at Suwannee which was expected to come into service in June 2013.

On July 17, 2008, Commission staff filed its recommendation for approval of PEF's standard offer contract and associated tariffs in Docket No. 080187-EQ. The recommendation was scheduled to be considered by us at the July 29, 2008, Agenda Conference. On July 15, 2008, PEF filed the petition for rule waiver and approval of standard offer contract which opened this docket. In this filing, the company explains that a request for proposals (RFP) has been issued for the Suwannee combined cycle unit. PEF also indicated that it does not have an upcoming planned purchase in its Ten-Year Site Plan. Citing the requirement of Rule 25-17.250(1) and (2)(a), F.A.C., that each standard offer contract shall remain open until an RFP has been issued for the avoided generating unit, PEF requests that we grant a waiver of rule in order to continue to use the costs associated with the Suwannee unit as the full avoided cost basis for the standard offer contract. Further, the July 15, 2008, filing also includes updated costs aligned with the costs in the RFP.

On July 23, 2008, PEF filed a motion to withdraw its initial standard offer contract and COG-2 rate schedule that had been filed on April 1, 2008, in Docket No. 080187-EQ.² Accordingly, Commission staff withdrew the recommendation that had been filed in that docket.

This Order addresses the petition for waiver of rules, as well as the second standard offer contract and associated tariffs filed for approval by PEF on July 15, 2008. We have jurisdiction over this matter pursuant to Sections 120.542, 366.04 through 366.06, 366.91, and 366.92, F.S.

Decision

Rule Waiver

Rules 25-17.250(1) and (2)(a), F.A.C., require each electric IOU to file with us by April 1 of each year a standard offer contract for the purchase of firm capacity and energy from renewable generating facilities and small qualifying facilities with a design capacity of 100 kW or less. The standard offer contracts reflect each IOU's next avoided unit shown in its most recent Ten-Year Site Plan. The rules further require that "[e]ach investor-owned utility with no planned generating unit identified in its Ten-Year Site Plan shall submit a standard offer based on avoiding or deferring a planned purchase."

Rule 25-17.250(a), F.A.C. directs that, in order to ensure that each IOU continuously offers a contract to producers of renewable energy, each standard offer contract shall remain open until: 1) a request for proposal (RFP) is issued for the utility's planned generating unit, or 2) the IOU files a petition for a need determination or commences construction for generating units, or 3) the generating unit upon which the standard offer contract was based is no longer part

¹ See Docket No. 080187-EQ, In re: Petition for approval of amended standard offer contract and COG-2 rate schedule, by Progress Energy Florida

² PEF's withdrawal of its initial standard offer contract was acknowledged by Order No. PSC-08-0695-FOF-EQ, issued October 20, 2008.

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of the IOU's generation plan, as evidenced by a petition to that effect filed with us or by the utility's most recent Ten-Year Site Plan.

In its petition, PEF asks us for a waiver of the rules because it does not have an avoided unit for purposes of a standard offer contract, nor does it have a planned capacity purchase for purposes of a standard offer contract in its Ten-Year Site Plan. PEF states that it currently does not have an avoided unit for purposes of a standard offer contract because it issued a RFP for the 2013 Suwannee combined cycle unit, and does not have any other units in its ten year site plan that qualify for use as an avoided unit. Instead, PEF requests that we allow it to use the Suwannee unit as a proxy avoided unit, with updated pricing, in connection with its standard offer contract.

Pursuant to 120.542(6), F.S., PEF's request for waiver of rules was submitted to Florida Administrative Weekly for publication. Interested parties had until August 22, 2008, to submit written comments. No public comment was received.

Section 120.542, F.S., authorizes us to grant variances or waivers to the requirements of our rules where the person subject to the rules has demonstrated that the underlying purpose of the statute has been or will be achieved by other means, and strict application of the rules would cause the person substantial hardship or would violate principles of fairness. "Substantial hardship" as defined in this section means demonstrated economic, technological, legal, or other hardship.

The underlying statutory provision pertaining to the above-mentioned rules is Section 366.91, F.S. Section 366.91(1), F.S., states:

The Legislature finds that it is in the public interest to promote the development of renewable energy resources in this State. Renewable energy resources have the potential to help diversify fuel types to meet Florida's growing dependency on natural gas for electric production, minimize the volatility of fuel costs, encourage investment within the State, improve environmental conditions, and make Florida a leader in new and innovative technologies.

Section 366.91(3), F.S., enumerates requirements to promote the development of renewable energy resources. In summary:

- a) By January 1, 2006, each investor-owned electric utility (IOU) and municipal utility subject to the Florida Energy Efficiency and Conservation Act (FEECA) of 1980 must continuously offer to purchase capacity and energy from specific types of renewable resources;
- b) The contract shall be based on the utility's full avoided costs, as defined in Section 366.051, Florida Statutes; and,
- c) Each contract must provide a term of at least ten years.

We find that a waiver of the rules is necessary for PEF to determine standard offer contract payments for capacity and energy. After a RFP is issued for an avoided unit, the rules

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direct a utility to base the standard offer contract payments on the *next* avoidable unit or deferred purchase. However, in this case, there are none. We find that it is appropriate for PEF to determine standard offer contract payments for capacity and energy based on the Suwannee Unit as it remains an avoidable unit, and there are no next avoidable units or deferred purchases. We also find that the Suwannee Unit is still an avoidable unit because the RFP for the Suwannee Unit was released June 2008 and is not yet concluded. A waiver of the rules allows us to continue promoting the development of renewable energy resources in Florida because it allows PEF to offer an economically feasible standard offer contract for renewable energy.

We find PEF has demonstrated it will suffer a substantial hardship if the provisions of Rules 25-17.250(1) and (2)(a), F.A.C. are strictly applied; therefore, PEF has provided a basis for a waiver of the rules.

Standard Offer Contract

Rule 25-17.250(1), F.A.C., requires PEF to continuously make available a standard offer contract for purchase of firm capacity and energy from renewable generating facilities and small qualifying facilities with a design capacity of 100 kW or less. In response to this requirement, on April 1, 2008, PEF filed a standard offer contract based on the Suwannee Unit 4, a combined cycle unit planned to begin commercial operation by June 2013. However, the company issued a RFP for Suwannee Unit 4 on June 12, 2008.

PEF explains that this second standard offer contract with associated tariffs is identical to the first standard offer contract and associated tariffs filed on April 1, 2008, in every respect, except that avoided costs for the 2013 Suwannee combined cycle unit have been updated to reflect PEF's most recent calculation. The cost increase from the first contract of April 1, 2008, to the second contract of July 15, 2008, is significantly greater than would have been typically expected over a period of a few months. PEF explains that the revised avoided costs include three major modifications. First, the recent estimate of costs reflects a better defined scope that was utilized in the RFP process, as compared with the process utilized for the estimate in the Ten-Year Site Plan. Second, over the time period since the estimate for the Ten-year Site Plan, the prices for equipment, labor and material have escalated significantly. Third, power projects and other construction projects are straining the capacity of manufacturing and construction facilities on a world-wide scale. This is reflected in an increase in the contingency factor used in the later estimate.

Tariff Sheet No. 9.415 provides for a contract term extending through May, 2023. As required by Rule 25-17.250(3), F.A.C., this term includes ten years of operation by the avoided unit.

The contract offers capacity payments that are in compliance with requirements of Rule 25-17.250(4), F.A.C. Table 3 on Tariff Sheet No. 9.455 shows options that are available to the renewable generator. The choices include payment streams that begin when the renewable capacity is available, or when the avoided unit goes into service.

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If energy payments begin prior to the avoided unit in-service date, the rates may be based on PEF's actual hourly avoided energy costs, or the rates may be based on PEF's annual projection of system incremental costs, excluding economy sales. Energy payments made after the in-service date of the avoided unit are calculated using each hour's firm energy rate. These options are described on Tariff Sheet No. 9.456, and meet the requirements of Rule 25-17.250(6), F.A.C.

Tariff Sheet Nos. 9.439 and 9.440 provide for either party to reopen the contract under specific conditions. If revisions to environmental laws or other regulations will result in a change in the cost of the avoided unit beyond a threshold amount, then the impacted party may request the recalculation of avoided cost. The threshold of the incremental change in cost is to be mutually agreed and included as part of the contractual arrangements. This provision satisfies the requirements of Rule 25-17.270, F.A.C.

Ownership of the environmental attributes associated with electric generation under the contract remains with the renewable generator. Tariff Sheet No. 9.417 gives PEF first right of refusal, and sets a threshold for the selling price to any other buyer. The arrangements are in accord with Rule 25-17.280, F.A.C.

The terms and operating provisions of the 2008 Renewable Standard Offer Contract submitted by Progress Energy Florida conform to all requirements of Rules 25-17.200 through 25-17.310, and 25-17.0832(4), F.A.C. The contract provides flexibility in the arrangements for payment so that a developer of renewable generation may select the payment stream best suited to his financial needs. At the same time, security provisions of the contract provide protection for PEF's ratepayers.

In conclusion, we find that PEF's proposed standard offer contract is in compliance with Rules 25-17.200 through 25-17.310, F.A.C., and shall therefore be approved and made effective as of September 29, 2008. The associated tariffs shall be effective September 29, 2008.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Progress Energy Florida's petition for a waiver of Rules 25-17.250(1) and (2)(a), Florida Administrative Code, is granted. It is further

ORDERED by the Florida Public Service Commission that the Standard Offer Contract and associated tariffs proposed by Progress Energy Florida are hereby approved, effective September 29, 2008. It is further

ORDERED that if a protest is filed within 21 days of issuance of this Order, the tariffs shall remain in effect pending resolution of the protest. It is further

ORDERED that if no timely protest is filed, this docket shall be closed upon the issuance of a Consummating Order.

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By ORDER of the Florida Public Service Commission this 23rd day of October, 2008.



ANN COLE
Commission Clerk

(SEAL)

JEH

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 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 Commission's decision on this tariff is interim in nature and will become final, unless a person whose substantial interests are affected by the proposed action files 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 Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 13, 2008.

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.