

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-09-0214-PHO-EI
ISSUED: April 9, 2009

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code (F.A.C.), a Prehearing Conference was held on April 6, 2009, in Tallahassee, Florida, before Commissioner Nancy Argenziano, as Prehearing Officer.

APPEARANCES:

JOHN T. BURNETT, ESQUIRE, Progress Energy Service Company, LLC, 100 Central Avenue, St. Petersburg, Florida 33733-4042
On behalf of Progress Energy Florida, Inc. (PEF).

JAMES W. BREW, ESQUIRE, and F. ALVIN TAYLOR, ESQUIRE, 1025 Thomas Jefferson Street, NW, Eighth Floor, West Tower, Washington, DC 20007-5201
On behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (PCS Phosphate).

JEAN HARTMAN, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Florida Public Service Commission (Staff).

MARY ANNE HELTON, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
Advisor to the Florida Public Service Commission.

PREHEARING ORDER

I. 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 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, Florida Administrative Code (F.A.C.), implement the statutes.

DOCUMENT NUMBER-DATE

03184 APR-9⁰⁹

FPSC-COMMISSION CLERK

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 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.

We approved PEF's petition for waiver of rules and 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. by Order No. PSC-08-0706-TRF-EI, issued October 23, 2008. 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. 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. 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 without date 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 the pending docket.

This Order is issued pursuant to the authority granted by Rule 28-106.211, F.A.C., which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

II. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, F.A.C., this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

III. JURISDICTION

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 366, F.S.. This hearing will be governed by said Chapter and Chapters 25-6, 25-17, 25-22, and 28-106, F.A.C., as well as any other applicable provisions of law.

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.

IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

Information for which proprietary confidential business information status is requested pursuant to Section 366.093, F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 366.093, F.S. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093, F.S., to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093 F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Office of Commission Clerk's confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the

correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

The parties shall avoid duplicative or repetitious cross-examination. Further, friendly cross-examination will not be allowed. Cross-examination shall be limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Any party conducting what appears to be a friendly cross-examination of a witness should be prepared to indicate why that witness's direct testimony is adverse to its interests.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
David W. Gammon	PEF	1 - 6
Martin J. Marz	PCS Phosphate	1 - 6
<u>Rebuttal</u>		
David W. Gammon	PEF	1 - 6

VII. BASIC POSITIONS

PEF: The Standard Offer Contract for Renewable Energy and Qualifying Facilities is a contract that PEF must offer and be obligated under without any negotiation. The Standard Offer Contract cannot and should not attempt to encompass all terms and provisions desired by a particular renewable generator. Additional or different provisions, which are tailored to a particular renewable generator's

needs, can be negotiated, using the Standard Offer Contract as a baseline to begin negotiations. The Commission's Standard Offer Contract rules promote renewable generation, as does PEF's Standard Offer Contract, which complies with those rules. Accordingly, PEF's Standard Offer Contract should be approved.

PCS

Phosphate:

Florida has adopted an energy strategy for the State that places a high priority on the promotion of renewable energy production. This is reflected throughout applicable Florida statutes and regulatory requirements, most succinctly in the objectives articulated in Rules 25-17.001(d) and 25-17.200, Florida Administrative Code. The purpose of a standard offer contract is to facilitate renewable energy goals by establishing price, terms and conditions that a renewable energy producer can accept with no further negotiation. Given the limited cost-effective generation supply options available to Florida consumers today, other than increasing reliance on natural gas for electric generation, the Commission should carefully scrutinize the standard offer contract for RF/QFs for terms and conditions that may impede production from such alternative resources. In addition to ensuring compliance with existing state policies, this scrutiny will have the added benefit of removing barriers to satisfying the requirements of proposed renewable portfolio standards.

The Commission's review of utility's standard offer contracts has focused primarily on the energy and capacity pricing provisions based on designated avoided fossil-fueled units consistent with the requirements of Rule 25-17.250, Florida Administrative Code. A standard offer contract, however, is a complete contractual package that includes numerous price and non-price terms, conditions and requirements. These non-price terms, conditions and requirements may have a significant bearing on renewable energy production and development. For the most part, Rule 25-17.250, F.A.C., neither requires nor permits specific non-price terms and conditions. Indeed, the rule does not discuss these provisions at all. Moreover, no presumption of reasonableness attaches to the terms and conditions filed by PEF in its standard offer contract that are not required by the rule. PEF must affirmatively establish that those provisions help further Florida's renewable energy objectives.

As explained in PCS Phosphate's Petition to Intervene and the Direct Testimony of Martin J. Marz, PEF's standard offer contract contains provisions that are not consistent with the specific provisions of the Commission's regulations or the statutory policies and purposes that govern renewable energy policy. As an example, PEF imposes a methodology for calculating a RF/QF's capacity payments that not a single natural gas fired unit in its power plant inventory satisfies. Similarly, PEF demands an option to purchase a renewable energy supplier's environmental attributes without paying for that option. In addition to

these price-related provisions, PEF demands a variety of the non-price terms and conditions that are unreasonable

Because the standard offer contract is inconsistent with both the specific instructions in the Commission's regulations as well as the policy provisions of the Florida statutes and Commission regulations, the Commission must either reject PEF's proposed standard offer contract or mandate required changes to the contract. In particular, the Commission should require PEF to (i) revise its methodology for calculating capacity payments; (ii) include all costs associated with the avoided unit; and (iii) adopt non-price terms and conditions that are commercially reasonable and reflect standard industry practice. With respect to this last element, in Exhibit MJM-1, PCS Phosphate has revised the standard offer contract to be more fair and equitable to both parties while still recognizing the unique circumstances of a standard offer contract. The proposed revisions are generally based on industry-standard agreements or contracts to which PEF was a party. These changes are required for the standard offer contract to comply with and serve its intended function and the policies and purposes set forth at Section 366.91, Florida Statutes, and Rules 25-17.001 and 25-17.200, F.A.C..

Each investor-owned electric utility in Florida is required to re-file its standard offer contract every April. In order for changes that the Commission may order to PEF's 2008 standard offer contract in this docket to have any remaining relevance and vitality, the Commission should direct PEF to incorporate those changes into all subsequent versions of PEF's standard offer contract unless PEF expressly proposes and justifies any departure in a future filing.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

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

POSITIONS

PEF: Yes. PEF's Standard Offer Contract complies with the Commission's Standard Offer Contract rules, Rules 25-17.200 through 25-17.310, F.A.C.

PCS

Phosphate: No. The standard offer contract fails to meet the purposes set forth at Rules 25-17.001 and 25-17.200 through 25-17.310, Florida Administrative Code, because it fails to (i) promote the development of renewable energy; (ii) protect the economic viability of Florida's existing renewable energy facilities; (iii) diversify the types of fuel used to generate electricity in Florida; (iv) lessen Florida's dependence on natural gas and fuel oil for the production of electricity; (v) minimize the volatility of fuel costs; (vi) encourage investment within the state; (vii) improve environmental conditions; and (viii) minimize the costs of power supply to electric utilities and their customers.

PEF's failure in this regard stems from the numerous terms and conditions in the standard offer contract that conflict with the specific requirements of the Commission's regulations. Mr. Marz' testimony and exhibits address specific terms that are unreasonable and propose remedies based on standard industry practice and terms adopted in PEF's negotiated contracts that should have general applicability.

STAFF: Staff takes no position at this time.

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

POSITIONS

PEF: No.

PCS

Phosphate: Yes. PEF has proposed terms and conditions that are inconsistent with the FPSC's regulations. For example, Rule 25-17.0832(4)(e)8, F.A.C. requires PEF to establish "performance standards [that] approximate the anticipated peak and off-peak availability and capacity factor of the utility's avoided unit over the term of the contract". However, PEF has imposed minimum performance standards that neither the avoided unit nor any similar unit in PEF's generation fleet actually satisfies. As another example, Rule 25-17.0832(4)(f)1, F.A.C. states that if a utility elects to require some form of assurance, such "[p]ayment or surety shall be refunded upon completion of the facility and demonstration that the facility can deliver the amount of capacity and energy specified in the contract". (emphasis added) Rather than accept this requirement, PEF refuses to refund any surety upon satisfaction of the specified conditions.

STAFF: Staff takes no position at this time.

ISSUE 3: Do the non-price terms and conditions of the PEF's standard offer contract that are specifically addressed by Florida Statutes or Commission regulations comply with the policies and purposes set forth in Section 366.91, Florida Statutes and Rules 25-17.001 and 25-17.200, Florida Administrative Code?

POSITIONS

PEF: Yes.

PCS

Phosphate: No. PEF has proposed contractual terms and conditions that are onerous, one-sided, commercially unreasonable and beyond the scope of the Commission's regulations. These provisions therefore fail to comply with the policies and purposes set forth at Section 366.91, Florida Statutes, and Rules 25-17.001 and 25-17.200, Florida Administrative Code.

STAFF: Staff takes no position at this time.

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

POSITIONS

PEF: Yes.

PCS

Phosphate: No. First, PEF failed to include all appropriate cost components in its calculation of the cost of the avoided unit. Second, PEF's methodology for calculating an RF/QF's capacity payment is (i) inconsistent with the characteristics of the avoided unit and its existing gas-fired units and (ii) fails to acknowledge the nature of renewable generation.

STAFF: Staff takes no position at this time.

ISSUE 5: Should Docket 070235-EQ, Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100 kW tariff, by Progress Energy Florida, Inc., be closed?

POSITIONS

PEF: Yes.

PCS

Phosphate: Subject to the acceptance into the record of this proceeding of the Direct Testimony of Martin J. Marz , as well as the testimonies of David Gammon, if requested by PEF, yes.

STAFF: Staff takes no position at this time.

ISSUE 6: Should this docket be closed?

POSITIONS

PEF: Upon FPSC approval of the Standard Offer Contract, this docket should be closed.

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: Staff takes no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>		<u>Description</u>
			<u>Direct</u>
David W. Gammon	PEF	DWG-1	Protest of PCS Phosphate-White Springs (Dkt# 070235)
David W. Gammon	PEF	DWG-2	Direct testimony of David Gammon (Dkt# 070235)
David W. Gammon	PEF	DWG-3	Direct testomony of Martin J. Marz on behalf of PCS Phosphate-White Springs (Dkt# 070235)
David W. Gammon	PEF	DWG-4	Rebuttal testimony of David Gammon (Dkt# 070235)

<u>Witness</u>	<u>Proffered By</u>		<u>Description</u>
Martin J. Marz	PCS Phosphate	MJM-1	Proposed Changes to PEF's Standard Offer Contract
Martin J. Marz	PCS Phosphate	MJM-2	Capacity Factor of PEF's Combined Cycle Units
Martin J. Marz	PCS Phosphate	MJM-3	Excerpts from Vandolah Power Company and PEF Tolling Agreement

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

There are no pending motions at this time.

XII. PENDING CONFIDENTIALITY MATTERS

There are no pending confidentiality matters at this time.

XIII. POST-HEARING PROCEDURES

If no bench decision is made, each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of this Prehearing Order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, F.A.C., a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time.

XIV. RULINGS

Opening statements, if any, shall not exceed ten minutes per party.

It is therefore,

ORDERED by Commissioner Nancy Argenziano, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Nancy Argenziano, as Prehearing Officer, this 9th day of April, 2009.



NANCY ARGENZIANO

Commissioner and Prehearing Officer

(S E A L)

JEH

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.