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April 22, 2002

-VIA HAND DELIVERY-

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

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Re: Docket Nos. 020262-EI and 020263-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and seven (7) copies of the Response of Florida Power & Light Company to Joint Motion for Summary Final Order of Calpine Energy Services, L.P. and Reliant Energy Power Generation, Inc.

If there are any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

Charles A. Guyton

Charles A. Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition To Determine Need For an Electrical Power Plant in Martin County by Florida Power & Light Company.	)	**Docket No. 020262-EI**
In re: Petition To Determine Need For an Electrical Power Plant in Manatee County by Florida Power & Light Company.	)	**Docket No. 020263-EI**
	)	**Dated: April 22, 2002**

RESPONSE OF FLORIDA POWER & LIGHT COMPANY TO JOINT MOTION FOR SUMMARY FINAL ORDER OF CALPINE ENERGY SERVICES, L.P. AND RELIANT ENERGY POWER GENERATION, INC.

Florida Power & Light Company ("FPL") hereby files this Response to The Joint Motion For Summary Final Order Of Calpine Energy Services, L.P. and Reliant Energy Power Generation, Inc. ("Joint Motion") filed April 11, 2002 in these dockets. The Joint Motion should be denied for the reasons set forth below.

Summary of Argument

There are four independent reasons why the Joint Motion should be denied:

1. FPL has complied with Rule 25-22.082, Florida Administrative Code, ("the Bid Rule") in its entirety. FPL's compliance has resulted in the most successful capacity RFP in the history of Florida and the selection of the most cost-effective, lowest risk alternatives for the benefit of FPL's customers, as contemplated by the Bid Rule.
2. The Movants' strained, self-serving interpretation of the Bid Rule leads to the counterproductive result of dismissing petitions that resulted from a competitive RFP as contemplated by the Bid Rule, a RFP that evaluated FPL's proposed units against the eligible proposals submitted by the

Movants and produced the most cost-effective, lowest risk alternatives. This is at odds with the history and prior interpretation of the Bid Rule.

3. There are disputed issues of material fact in this case, as acknowledged by the Movants in their petitions to intervene, even as to the narrow issue they seek to raise here. A motion for summary final order may not be granted when there is any disputed issue of material fact.

4. When the facts are considered in the light most favorable to FPL, as they must be, dismissal of FPL's petitions to determine need would violate the Commission's statutory duty to approve the proposed generating units which are the most cost-effective alternatives to meet FPL's undisputed capacity need. The Bid Rule contemplates that compliance with Section 403.519, Florida Statutes, controls relative to compliance with the technical requirements of the Bid Rule. That is why the Commission may waive any provision of the rule that does not or will not result in the selection of the most cost-effective alternative. Dismissal despite FPL's good faith attempt to comply with the Bid Rule would be inconsistent with not only Section 403.519, Florida Statutes, but also the Bid Rule itself.

Each of these reasons is discussed in detail below and each compels denial of the Joint Motion. Of greatest importance from a regulatory-policy perspective, however, is that the Joint Motion would have the Commission adopt an interpretation of the phrase "next planned generating unit" that is at odds with the rulemaking history and prior Commission interpretation of the Bid Rule. Under the Movants' interpretation, a utility's only available self-build option would be the

unit(s) identified in the original RFP document; the utility would have no flexibility to select and build a generating alternative that was identified after the RFP document was published, even if that new alternative was more cost-effective to the utility's customers.

This strained and inflexible interpretation of the Bid Rule is totally at odds with the rulemaking history and the Commission's prior pronouncements regarding the Bid Rule. When the Bid Rule was adopted, the Commission noted that the "estimate" being provided in a RFP document was "nonbinding." It was also noted that the purpose of the Bid Rule was not to level the playing field between utilities who had an obligation to serve and IPPs that did not; rather, the Commission's motive in adopting the Bid Rule was to afford the opportunity for a better deal for customers.

The Commission later elaborated on its intended operation of the Bid Rule in the Gulf Power rule waiver case. The discussion at the agenda conference shows unequivocally that each of the Commissioners understood the Bid Rule to allow a utility to update or change its cost estimate even after receiving RFP bids; in other words, the utility was permitted (even encouraged) to meet or beat RFP proposals. The Commission found that this approach best served customer interests.

FPL's decision to consider alternatives that might better serve customers than the "next planned generating unit" set forth in its RFP is exactly the type of change that the Commission has previously found to be appropriate. In this case, FPL's search for better alternatives yielded one that is more cost effective than the proposals submitted by the Movants and the other RFP respondents. Ignoring that better alternative would serve nothing but the Movants' narrow self-interests. Dismissing the need petitions based on the Movants' strained and inflexible

interpretation of the Bid Rule would frustrate the purpose of the Section 403.519 and the Bid Rule. The Joint Motion should be denied.

Background

When the Joint Motion is viewed in context, it is readily apparent that the Movants' legal ploy neither benefits FPL's customers nor encourages competition. It only serves the competitive interests of the Movants at the expense of FPL's customers. The Joint Motion frustrates the interests of FPL's customers in obtaining reliable service at reasonable costs. Stated simply, it asks the Commission to protect competitors rather than competition.

After conducting its most successful RFP, FPL has petitioned for a determination of need for Martin Unit 8 and Manatee Unit 3. In its RFP conducted pursuant to the Bid Rule, FPL undertook an extensive analysis in which Martin Unit 8 and Manatee Unit 3 were evaluated head to head against portfolios consisting of all the eligible RFP proposals (80 proposals submitted by 15 entities), including the eligible proposals submitted by the Movants. FPL's analysis, as well as the analysis of an independent third party, was performed in a fashion that gave advantages to RFP proposals over FPL options. Nonetheless, the analyses showed that Martin Unit 8 and Manatee Unit 3 were not only the most cost-effective alternatives to meet FPL customers' incremental need in 2005 and 2006, but also were the lowest risk alternatives to FPL's customers.

Despite FPL's well-documented compliance with the Bid Rule, two frustrated bidders (neither of whose bids were within $100 million of FPL's proposed portfolio, and both of which played fast and loose with the requirements of the RFP) are attempting to undo this nine-month process without having the Commission consider the merits of FPL's petitions, testimony or evidence. This would be extraordinary relief.

Of course, the Movants have neither an obligation to serve FPL's customers nor any responsibility to limit prices for their power to benefit customers. They serve solely the interests of their shareholders who stand to benefit significantly if the Movants, who have existing facilities in Florida, can delay these two necessary units, create a capacity shortfall and use their own units to sell power to FPL.

The Commission is being asked to ignore completely the compelling merits of FPL's extensive filings and act in a fashion that penalizes customers for FPL's good faith compliance with the Bid Rule. As intended by the Bid Rule, a successful solicitation was conducted, the units in the resulting determination of need were evaluated against the Movants' and other RFP bidders' proposals, and the most cost-effective, lowest risk alternative was chosen. The Movants ask the Commission to disregard this reality, even though it is amply supported by FPL's pleadings, testimony and exhibits, and impose the drastic remedy of dismissing FPL's need petitions based on a strained, self-serving interpretation of the Bid Rule. That is the context of the Joint Motion.

Standard For Consideration

The Movants have filed a motion for summary final order seeking dismissal of FPL's need petitions. Knowing that they cannot meet the standard for dismissal under a motion to dismiss -- assuming that the facts alleged by FPL in its Petitions are true, FPL clearly states a cause of action upon which relief may be granted -- the Movants chose another vehicle for arguing dismissal - a motion for summary final order.

But this tactical switch is unavailing. As the Movants acknowledge, there are two necessary requisites for a motion for summary final order, neither of which the Movants have shown. First, there may not be <u>any</u> genuine issue of material fact, and second, one of the parties

must be entitled to entry of a final order as a matter of law on the undisputed facts. Section 120.57(10)(h), Fla. Stat. In considering these requisites, the record is to be viewed in the light most favorable toward the party against whom the summary final order would be entered, in this instance FPL.

The Facts Most Favorable To FPL Do Not Warrant Dismissal

None of the following facts -- which are fully supported by FPL's petition, testimony and exhibits -- support dismissal.

- FPL needs an additional 1150 MW of capacity in 2005 to meet its reliability criteria and maintain system reliability.

- FPL needs another 600 MW of additional capacity in 2006 to meet its reserve margin criterion and maintain system reliability.

- To meet its capacity needs in 2005 and 2006, FPL conducted a RFP pursuant to the Bid Rule.

- FPL's RFP was extraordinarily successful, resulting in fifteen bidders submitting eighty eligible proposals.

- FPL analyzed the proposals over a period of four months, and in that analysis Martin Unit 8 and Manatee Unit 3 competed head to head against all the RFP proposals, including the proposals submitted by the Movants.

- FPL's economic analysis showed that Martin Unit 8 and Manatee Unit 3 were the most cost-effective alternatives to meet FPL's 2005 and 2006 reliability needs.

- The proposals submitted by the Movants were far more costly than Martin Unit 8 and Manatee Unit 3.

- FPL's analysis also showed that the Martin Unit 8 / Manatee Unit 3 had superior non-price attributes, making that portfolio a lower risk alternative to FPL's customers.

- FPL's analysis was independently confirmed by a third party evaluator.

- Based upon the results of the RFP, FPL has petitioned for a determination of need for both Martin Unit 8 and Manatee Unit 3.

The applicable standard requires the Commission to take each of these facts as true in evaluating the Joint Motion. It is readily apparent that, when viewed from this perspective, the Joint Motion is fatally flawed, and granting it would frustrate the purpose of Section 403.529, Florida Statutes and prejudice FPL's customers.

There Are Numerous Disputed Issues of Material Fact

Section 120.57(1)(h) allows entry of a summary final order only if "no genuine issue as to any material facts exists and that the moving party is entitled as a matter of law to the entry of a final order." In this proceeding there are numerous issues of disputed material facts.

The easiest means of demonstrating this is to look to the petitions to intervene filed by both Movants. A requirement of the rules regarding intervention before the Commission is that an intervenor state the issues of material fact it believes are disputed. Rules 25-22.039, 28-106.201(2)(d), Florida Administrative Code. Reliant and Calpine have identified, respectively, 12 and 50 disputed issues of material fact in their petitions to intervene.[1] The statute and the case law are clear: a motion for summary final order does not lie when there is any disputed issue of material fact. Section 120.57(1)(h), Fla. Stat.; Weber v. Porco, 100 So.2d 146 (Fla. 1958). In this case, as acknowledged by the Movants, there are myriad disputed issues of material fact.

[1] The Movants have also submitted preliminary issue lists in which they have identified other disputed issues of material fact that they would have the Commission address.

No doubt, the Movants will attempt to have the Commission narrow the scope of its consideration to the facts regarding FPL's compliance with the Bid Rule. But that tactic will not salvage the Joint Motion. There are disputed issues of material fact as to whether FPL complied with the Bid Rule and whether the Movants, as they allege in their Joint Motion, were prejudiced by FPL's alleged noncompliance. Among the disputed issues of material fact relating to FPL's compliance with the Bid Rule are the following:

1. Whether FPL included in its RFP document its next planned generating units.
2. Whether the self-build options that FPL considered and evaluated against the RFP proposals were FPL's next planned generating units.
3. Whether the RFP proposals, including Reliant's and Calpine's, were evaluated against Martin Unit 8 and Manatee Unit 3 in FPL's RFP process.
4. Whether Martin Unit 8 and Manatee Unit 3 are FPL's next planned generating units.
5. Whether Martin Unit 8 and Manatee Unit 3 are more cost-effective options than Calpine's and Reliant's and the other RFP proposals.
6. Whether FPL's customers receive benefits with FPL's selection of Martin Unit 8 and Manatee Unit 3 over Calpine's, Reliant's and other RFP respondents' proposals.
7. Whether Calpine, Reliant or other RFP respondents were prejudiced by FPL's evaluation of Martin Unit 8 and Manatee Unit 3 against their RFP proposals rather than the next planned generating units identified in the RFP document.

These disputed issues must be addressed with evidence. At the moment, the only evidence in the record on these issues is FPL's. If one takes that evidence as undisputed, then it is FPL, not the

Movants, that is entitled to a summary final order, for FPL's direct case shows that Martin Unit 8 and Manatee Unit 3 are economically and non-economically superior to Calpine's, Reliant's and the other RFP bidders' alternatives. Therefore, the Joint Motion fails the first part of the standard that must be met for a motion for summary final order to be granted.

The Movants Are Not Entitled To Relief As A Matter Of Law

The second part of the standard for a motion for summary final order is that the Movants, based upon the undisputed facts, are entitled to relief as a matter of law. Second 120.57(1)(h), Fla. Stat. The Movants are not entitled to dismissal as a matter of law for the following reasons:

1. FPL complied with the Bid Rule.
2. The Movants rely upon a strained and inflexible interpretation of the Bid Rule that is at odds with the history of the Bid Rule and prior Commission interpretations of the Bid Rule and which would yield an absurd result.
3. The Movants' interpretation of the Bid Rule would frustrate the purpose of the Section 403.519, Florida Statutes, and the provisions of the Bid Rule that evidence Commission's intent to comply with the purpose of the statute rather than force arbitrary compliance with the Bid Rule.

(1.) FPL's Compliance With The Bid Rule.

FPL initiated its RFP to comply with the Commission's Bid Rule. Throughout its RFP and selection of the best alternative for its customers, FPL has complied in good faith with the Bid Rule.

As required by subsection (2) of the Bid Rule, prior to filing its petitions for a determination of need, FPL evaluated supply-side alternatives to its next planned generating units by issuing a RFP. This is documented extensively in FPL's petition and its direct

testimony and exhibits, particularly the testimony of Messrs. Waters, Sim and Taylor. Consistent with subsection (1) (b) of the Bid Rule, FPL's RFP was a document in which FPL listed the price and non-price attributes of its next planned generating units to solicit proposals for supply-side alternatives to FPL's next planned generating units. This is apparent on the face of the RFP document, which is Appendix E to the Need Study, and it is also addressed in Dr. Sim's testimony. Consistent with subsection (1) (a) of the Bid Rule, the next planned generating units listed in FPL's RFP were the next planned generating unit additions planned for construction by FPL that would require certification pursuant to Section 403.519, Florida Statutes. That is the representation FPL made in its RFP document, and that representation is supported by the testimony of Messrs. Waters and Sim. Consistent with subsection (4)(a) of the Bid Rule, FPL included in its RFP document a detailed technical description of the unit or units on which the RFP was based. This is also shown on the face of the RFP document. Thus, FPL's RFP in fact met each of the sections of the Bid Rule which the Movants argue FPL failed to meet.[2]

(2.) The Movants Advance An Interpretation Of "The Next Planned Generating Unit" That Ignores the History and Prior Interpretation Of The Bid Rule And Leads To An Absurd Result.

FPL's next planned generating units for purposes of the Bid Rule are the units that FPL set forth in its RFP document. Any other interpretation of that term in the Bid Rule is strained and makes the Bid Rule inflexible and unlikely to achieve the purpose of either the Bid Rule or the underlying statute.

At the time FPL initiated its RFP, FPL's next planned generating units were: for 2005 a Martin conversion of 2 combustion turbines ("CTs") to a combined cycle ("CC") unit, a Ft.

[2] Even if FPL were arguably not in technical compliance with the Bid Rule, it certainly was in substantial compliance.

Myers conversion of 2 CTs into a CC unit, a new Martin CC unit and a new Midway CC unit; and for 2006, a new Martin CC unit. Each of those units would have required certification under Section 403.519, Florida Statutes, and each was planned for construction by FPL. It was these units for which FPL supplied the detailed information regarding the utility's next planned generating unit that is required by the Bid Rule. However, FPL also provided notice to the RFP bidders that these units were the fruits of FPL's 2000 planning process and that FPL planned to use the updated planning assumptions from its 2001 planning process to evaluate the RFP proposals and its self-build options.[2]

During the course of FPL's RFP evaluation, FPL introduced into the analysis thirteen FPL self-build options. None had been approved for construction. None of these options was planned for construction. They were potential self-build options available on FPL's system available to meet customers' needs. They were not FPL's "next planned generating units" within the meaning of Bid Rule. However, several of these options were CC units at the Martin plant site in different configurations, including the 2 on 1 configuration that FPL had used for the new CC units in its RFP document for the Martin and Midway plant sites. All these FPL options were evaluated against each other to determine the most cost-effective FPL options.

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[2] FPL stated the following regarding the cost estimates it provided for each of its next planned generating units in its RFP document, Appendix E to the Need Study at E-56 through E-60:

> The following data represent the planned unit data estimates, which FPL utilized in its 2000 planning and is provided for information purposes only. These planning estimates have not been refined by site specific costs, detailed engineering, or vendor quotes. The final actual cost of a project could be appreciably greater or smaller than that shown. Parties responding to this RFP should rely on their independent evaluations and estimates of project costs in formulating their proposals. FPL periodically updates its planning assumptions and will use its most current planning data to evaluate proposals and its self-build options.

Among those self-build options were the units that were eventually identified as Martin Unit 8 and Manatee Unit 3. Martin Unit 8 was a conversion of the two existing CTs at the Martin plant site into a CC unit akin to the Martin CT to CC conversion that was shown in FPL's RFP document, but it had a different size, configuration, operating parameters and cost. The unit that eventually evolved into Manatee Unit 3 began as a new Martin CC akin to the new Martin CC shown in the RFP document, but it had a different size, configuration, operating parameters and cost. That unit was ultimately switched to the Manatee site for security reasons.

The units ultimately selected by FPL -- Martin Unit 8 and Manatee Unit 3 -- were the units evaluated against the RFP proposals, including those submitted by Calpine and Reliant. FPL based its evaluation on those units because FPL's analysis showed them to be the most cost-effective FPL alternatives to meet FPL's need for capacity. Simply stated, Martin Unit 8 and Manatee Unit 3 are more cost-effective options than Reliant's and Calpine's (or any other RFP bidder's) proposals.

The Movants argue that the term "next planned generating unit" within the meaning of the Bid Rule must mean FPL's next planned generating units at the close of the RFP, in this case Martin Unit 8 and Manatee Unit 3. Therefore, they maintain that FPL did not comply with the Bid Rule because it did not identify or provide detailed technical information for those units in its RFP document. But this interpretation of the Bid Rule is improper. When one considers the purpose of the Bid Rule, the phrase "the next planned generating units" must mean the next planned generating units at the time FPL initiated the RFP, *i.e.,* the units listed in FPL's RFP document. This is the only interpretation that allows the Bid Rule to function as intended by the Commission: with the selection of the most cost-effective option for customers without endless, redundant RFPs. The Movants' interpretation of the Bid Rule would instead result in the

rejection of the most cost-effective alternative and in multiple, successive RFPs if at any point in the process a utility option that varies in any fashion from the option identified in the RFP document is identified as the most cost effective alternative.

The history and prior interpretation of the Bid Rule evidences that the "next planned generating unit" estimates that the utility is required to place in its RFP are "nonbinding" targets that the utility may revise, even after receiving and evaluating RFP proposals. The Bid Rule was never intended to bind a utility to those estimates. The detailed cost information was to be provided as much or more for the Commission's benefit as it was for the bidders to prepare bids. As shown below, it has previously been recognized by both the Commission and its Staff that this information is not necessary for sophisticated bidders to prepare bids. It has always been the intent that a utility would be able to refine its cost estimates for the next planned generating units and meet or beat IPP bids submitted during the RFP.

At the agenda conference in which the Commission adopted the Bid Rule, there was a lengthy exchange between the Commissioners and Staff regarding the purpose and application of the rule. During that discussion, it was recognized that the rule was not meant to create a level playing field between the utility and the IPPs; the rule was intended to result in a better deal for utility customers. See Attachment A, which includes excerpts from the December 6 and 7, 1993 agenda conference where the Bid Rule was adopted by the Commission, at 70-72, 144-147, 153-154. It was recognized that utilities continued to have an obligation to serve and because of that obligation, certain managerial prerogatives were reserved to utilities. Attachment A at 58-59, 136-140, 146-147. These prerogatives included the understanding that (a) the utility, not the Commission, conducts the RFP and selects the winning bidder, with the Commission reserving the right to pass judgment on the utility's conclusion, Attachment A at 52 - 61, and (b) the utility

is permitted to put a price on the table, solicit bids, and either select one or more bids for negotiation or reject all bids without having to pick finalists and choose its own unit as the best alternative for customers, Attachment A at 68, 91-93, 136-140. It was explicitly stated by Commissioner Deason that the information to be provided by a utility in the RFP is "nonbinding." Attachment A at 91. Thus, in adopting the Bid Rule, the Commission expressly confirmed that a utility's RFP information was not meant to bind a utility, and a utility could reject all bids based upon its determination that it could build cheaper.

Subsequent to the adoption of the Bid Rule, Gulf Power Company petitioned the Commission for a waiver of the requirement of the Bid Rule that it provide detailed cost and unit information in its RFP document. The Commission ultimately denied Gulf's request for a waiver, but in its discussions there was another lengthy exchange between the Commission and its Staff regarding the proper interpretation of the Bid Rule, the import of the cost information being provided in the RFP document, and the utility's clear right to change that information even after reviewing the RFP bids. Ms. Harlow, based upon her review of the transcript from the agenda conference at which the Bid Rule was adopted, summarized for the Commission the purpose of the Bid Rule and the intent of including avoided cost data in the RFP:

> [T]he primary rationale behind the rule was to encourage the selection of least cost generation. Providing IPPs with a point of entry gives utilities an added incentive to sharpen their pencil when making their own proposal.
>
> According to the hearing transcript, the intent of including avoided cost data in the RFP was to provide some basic information for potential bidders and also acts as a sanity check for the Commission itself when utilities file a need determination. It was not the intent of the rule to hold utilities to the avoided cost data provided in the RFP for cost recovery purposes.

Transcript of August 18, 1998 Agenda Conference in Docket No. 980783-EI, at 6,7.

At several points throughout the discussion, all the Commissioners and various other persons pointed out that the cost information presented in a utility's RFP was not binding upon the utility and the utility could change that information and beat RFP bids, even after the RFP bids had been evaluated. [3] For instance, Commissioners Deason and Johnson had the following exchange with Mr. Jenkins:

> COMMISSIONER DEASON: And if they are required to have their very best bottom-line price and be held to it when they present their RFP, then they are placed at a competitive disadvantage.
> MR. JENKINS: I don't think they're held to their RFP price.
> COMMISSIONER DEASON: Okay. Then what is the necessity of having any of this cost information provided up front?
> MR. JENKINS: Just so we don't get high prices. The idea of revealing that information of Gulf Power or utilities showing their cards, showing their card is that they give some idea to the bidders of what they have to

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[3] At page 16 Commissioner Garcia asked Gulf's counsel: "Can't you beat that bid though? When they come in with the bid, if you think that the bid is too high and you can do better, can't you do better?" Again at page 39 Commissioner Garcia had the following exchange with former Commissioner Cresse and Joe Jenkins:

"COMMISSIONER GARCIA: No, what I am saying is when this process is over, the utility looks at it. In other words, when our rule goes out there, all the - - you know. And your're right, we're asking the utility to pretty much show all its cards. When it shows its cards, and gets a series of bids, and it gets to pick the lowest bid, the utility still has the option, if I'm not mistaken, to beat that price, doesn't it?

MR.CRESSE: Sure, it does. I would assume it would have the option to beat that price. That's a clarification that I thinks need to be made.

COMMISSIONER GARCIA: Am I mistaken in that, Joe?

MR. JENKINS: I think that is correct."

Commissioner Jacobs also made statements that he understood that the utility would get a second bite of the apple, that it could submit an alternative different than what it published in its RFP document. See, page 68.

Ultimately, when the Commission voted to deny Gulf's requested waiver, it did so in large part based on its understanding that Gulf could come back after the fact and change its option to meet or beat the RFP proposals. See, remarks of Commissioners Garcia, Clark, Johnson at pages 77-82. Perhaps Commissioner Clark best summarized the exchange: "[T]hey [Gulf] will have an opportunity to put in yet another bid showing that they can meet the price. And in the end that will result, in my view, at least under the scenario we have been presented, with the least cost to customers." Transcript at page 78.

beat. Don't forget, Gulf Power will get to draw a second card; the bidders won't.
CHAIRMAN JOHNSON: What does that mean?
MR. JENKINS: That means that Gulf puts out its number in the RFP, the bidders respond, they know they have to beat that price. And when all of those prices come in through the passage of time, say, in about two or three months, then Gulf Power can come out with still another number. They're not held to that number.

Another representative exchange is the following dialogue among Commissioners Clark, and Garcia and Mr. Ballinger:

COMMISSIONER CLARK: Is that true, they do, in fact, get a second shot?
COMMISSIONER GARCIA: Yes.
MR. BALLINGER: Yes, ma'am, that was the whole intent. Since the utility does have the obligation to serve, they would be the ultimate surveyor, if you will, of the bids. They could even have a slightly higher priced bid and come in and convince you that their's is the best deal for other reasons.
COMMISSIONER CLARK: Or they could come in with a lower price.
MR. BALLINGER: Or they could come in with lower.
COMMISSIONER CLARK: Well, then, I think we have solved our problem.

Moreover, the Commission Staff explained to the Commission that the bid information was not needed so much by the bidders who were sophisticated and knew the cost of constructing units, but that the information was needed more by the Commission.[4] It is clear from these exchanges

[4] This is best captured in the following exchange among Commissioners Deason and Garcia and Mr. Ballinger:

"COMMISSIONER DEASON: Well, we need it, but the sophisticated bidders, they know what they can build a plant for, they don't need Gulf's cost information, they know what they can build it for, and if they want to be competitive with other bidders and Gulf, they are going to submit their best bid right of front.

MR. BALLINGER. Right. Because ultimately we are going to evaluate the bid versus the utility, we are going to look at these things to see which is the most cost-effective.

COMMISSIONER GARCIA: This is a backstop for us, though.

MR. BALLINGER: Exactly. If there was bidder out there who needed this information to submit a bid, I don't think I would want them selling in Florida. They are not sophisticated enough. The people out there know what it costs and what a utility can probably build it for."

that the Commission has interpreted the Bid Rule as permitting a utility to revise the cost estimate it places in its RFP document and do so to meet or beat RFP bids. The Commission consciously chose to permit this practice because it felt doing so would yield the best result for utility customers.

FPL's decision to evaluate the RFP proposals against estimates and self build options other than those published in its RFP is exactly the type of revision the Commission contemplates under the Bid Rule. Indeed, FPL was aware of and relied upon the Commission's observations in the Gulf case when considering whether it could update its cost estimates. It knew that the Commission has recognized, as early as the adoption of the Bid Rule, that the "estimates" to be included in the RFP were "nonbinding." It also knew that the Commission had concluded in the Gulf case that a utility could "sharpen its pencil" and change its cost estimate after having considered RFP bids. Of course, as various Commissioners pointed out in the Gulf case, requiring a utility to publish a cost estimate in its RFP and then allowing the utility to change that estimate after receiving and considering the RFP proposals achieves the intended goal: driving down the price for customers.

Thus, FPL's interpretation of the Bid Rule -- that the "next planned generating unit" is the unit or units that the utility plans to add at the beginning rather than at the end of a RFP -- is entirely consistent with the history and prior interpretation of the Bid Rule. It allows a utility to update its cost estimate during the RFP process and submit a more competitive alternative than the one initially published, because such an effort reduces costs to customers by yielding more cost-effective alternatives. In contrast, the Movants' interpretation of the Bid Rule -- that a utility may not update its RFP bid or analyze a more cost-effective alternative utility option, and if it does analyze a more cost effective option it has to repeat the RFP process before petitioning

for a determination of need even though the option has been evaluated against the RFP bids -- runs counter to the history and prior interpretation of the Bid Rule and precludes the utility from choosing the most cost-effective option for customers. It also leads to the absurd result that need petitions resulting from a RFP in which the proposed units were analyzed head-to-head with the RFP proposals would be dismissed and FPL would have to proceed with another wasteful and redundant RFP merely to be able to file a need petition. The Joint Motion provides no rational basis for the Commission to alter its prior interpretation.

(3.) The Movants' Interpretation Of The Bid Rule Would Frustrate The Intent of Section 403.519, Florida Statutes.

Section 403.519, Florida Statutes, the statute the Bid Rule is listed as implementing, contemplates that the Commission will consider in a need determination case whether the proposed unit is the most cost-effective alternative to meet an applicant's need. If it determines that such a unit is the most cost-effective alternative and the other statutory criteria are met, then the Commission has a statutory responsibility to grant an affirmative determination of need.

When the Commission adopted the Bid Rule, it included a waiver provision in subsection (9) which evidences on its face the Commission's view that the Bid Rule is subordinate to the statutory criteria of Section 403.519, Florida Statutes. Subsection (9) permits the Commission to waive the Bid Rule in whole or in part upon a showing that the waiver would likely result in the accomplishment of the criteria of Section 403.519, *i.e.,* lowering the cost of electricity to a utility's customers or increasing the reliable supply of electricity. The Commission created this waiver option because it did not want the operation of the Bid Rule to frustrate the intent or operation of Section 403.519.

The Commission is now confronted with an invitation to apply the Bid Rule in a manner that would frustrate the operation of Section 403.519. The Movants argue that the Commission

should not even hear the substance of FPL's need petitions because of what they argue is technically a non-compliance with the Bid Rule -- FPL did not list Martin Unit 8 and Manatee Unit 3 in its RFP document. Even if this argument were correct, which FPL has demonstrated above is not the case, dismissing FPL's need petitions based upon this rigid application of the Bid Rule would be to the detriment of FPL's customers and hence completely at odds with the Commission's responsibility under Section 403.519. Subsection (9) of the Bid Rule expressly contemplates that the Commission would waive such hyper-technical compliance, when necessary to achieve the objectives of Section 403.519.

Stated differently, if the Commission were to accept the Movants' interpretation of the Bid Rule and the draconian remedy advanced by the Movants of dismissing the need cases, the Commission's application of the Bid Rule would be at odds with the Commission's statutory duty under Section 403.519: to hear the evidence regarding whether the proposed units meet the criteria of that statute, and to grant an affirmative determination of need if supported by the evidence. Instead of implementing the statute, the Commission would be frustrating its operation. It is quite clear from the mere existence of the waiver provision of subsection (9) of the Bid Rule that the Bid Rule was not intended to frustrate the operation of Section 403.519, Florida Statutes. The Commission cannot and should not interpret or apply the Bid Rule in a fashion that frustrates the purpose and intent of the governing statute. Yet, that is precisely what the Joint Motion seeks.

Conclusion

The Joint Motion should be seen for what it is: an attempt to secure unwarranted, extraordinary relief for two frustrated bidders, at the expense of FPL's customers. The Movants have not shown that they were prejudiced by the FPL conduct they allege was improper, but even if they could do so, the Bid Rule was not intended to protect bidders or even place them on an equal footing with utilities that retain an obligation to serve. Rather, the Bid Rule was passed to protect the interest of customers. FPL applied the Bid Rule in a fashion that protects customers and serves the purpose of Section 403.519, Florida Statutes, while treating the RFP bidders fairly.

The Movants have failed to satisfy either part of the standard for securing a summary final order. There are numerous disputed issues of material fact, as documented by the Movants' own petitions to intervene. And, the Movants are not entitled to the extraordinary relief they seek as a matter of law. FPL complied in good faith effort with the Bid Rule, based upon its review of not only the language of the Bid Rule but also its history and prior interpretation. The Movants offer an interpretation of the Bid Rule that is inconsistent with the history and prior application and interpretation of the Bid Rule. Their interpretation would lead to the absurd result that, even though FPL evaluated the Movants' and the other RFP proposals against the FPL units ultimately selected before proceeding with its need petitions, FPL would have to conduct another costly and time consuming RFP.

Finally, the Movants' interpretation of the Bid Rule would place the Commission in the position of not discharging its statutory duty under Section 403.519, Florida Statutes, which is to hear the evidence and determine whether to grant a determination of need. The Bid Rule is supposed to facilitate, not frustrate, Section 403.519, Florida Statutes. The Bid Rule recognizes

the fundamental primacy of the Commission's statutory duties by including a rule waiver provision to protect against applications of the Bid Rule that would frustrate those statutory duties. The Joint Motion should be denied. FPL's need petitions should not be dismissed, and the Commission should proceed to hearing on the merits.

Respectfully submitted,

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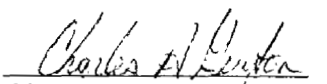
By: 
Charles A. Guyton

CERTIFICATE OF SERVICE
Docket Nos. 020262-EI, 020263-EI

I hereby certify that a copy of the foregoing Response Of Florida Power & Light Company To Joint Motion For Summary Final Order Of Calpine Energy Services, L.P. And Reliant Energy Power Generation, Inc. was served by hand delivery (*) or U.S. mail on this 22nd day of April, 2002 to the following:

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By: Charles A. Guyton
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ATTACHMENT A

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of Proposed Amendment of Rule 25-22.081, F.A.C., Contents of Petition; and Proposed Adoption of Rule 25-22.082, F.A.C., Selection of Generating Capacity.	DOCKET NO. 921288-EU

FIRST DAY - VOLUME I

Pages 1 through 119

PROCEEDINGS: SPECIAL AGENDA CONFERENCE

BEFORE: CHAIRMAN J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER LUIS J. LAUREDO
COMMISSIONER JULIA L. JOHNSON

DATE: Monday, December 6, 1993

TIME: Convened at 1:30 p.m.
Concluded at 3:50 p.m.

LOCATION: FPSC Hearing Room 106
Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32301

REPORTED BY: SYDNEY C. SILVA, CSR, RPR
PAMELA A. CANELL
Official Commission Reporters

PARTICIPATING:

WILLIAM D. TALBOTT, FPSC Executive Director.

MARY BANE, FPSC Deputy Executive Director/Administration.

MICHAEL PALECKI, FPSC Division of Legal Services.

MARSHA RULE, FPSC Division of Appeals.

TOM BALLINGER and BOB TRAPP, FPSC Division of Electric and Gas.

for the utilities to beat the bushes to see what's out there of qualified generating providers; from that, develop something to screen down to a manageable number of finalists with which to negotiate the best price for the ratepayer. And it may be their other project ends up being the best one from an overall perspective.

COMMISSIONER LAUREDO: What do you consider a manageable number of finalists?

MR. BALLINGER: Maybe three or five?

COMMISSIONER LAUREDO: So why don't we say that?

MR. BALLINGER: Well, again, it goes to I think it's the utility's decision. They may go through and find only one, and even that one they may not be able to reach a negotiation with. I wouldn't want to specify a number in a rule to always have three or always have five.

COMMISSIONER CLARK: Do I understand Issue 4 to be that we're not going to tell them that they have to select a winner and that's it?

MR. BALLINGER: When you say, "select a winner," do you mean select a winner out of the pool of respondents or can the winner also be the utility?

You have to remember, in Staff's view, the utility publishes its costs as part of the RFP, but it

doesn't actually submit a bid, if you will, like the others. It puts its price on the table but it's able to reject all bids if it can prove to us that it was in the best interest.

COMMISSIONER CLARK: What price do they put on the table, what --

MR. BALLINGER: Basically, what we have in the standard offer contracts.

COMMISSIONER CLARK: Okay.

MR. BALLINGER: Capital cost, O&M, fuel.

CHAIRMAN DEASON: That raises an interesting question.

Why should the utility provide that cost information up front? Why shouldn't the utility, if it's going to participate in a bid, submit the bid and if it has to be to a third party who takes the bids and makes sure nobody tampers with the bids during the process and then whoever is going to evaluate, whether it's the utility, the Commission or another third party, that that bid is opened and is reviewed and it's scored some way, and the utility wins or loses. Realizing there is going to have to be some subjective review and analysis utilizing that, we're not envisioning simply you just add up the scores and whatever the highest scores win.

MR. BALLINGER: In this issue there's several, and I spent a lot of time on the stand trying to explain this.

If you go to a mechanism, let's say the utility evaluates all sealed bids. And there is some subjectivity in there, so the utility uses its discretion and ends up selecting itself. Well, that appears to invite litigation.

On the other hand, what is the whole purpose of having a sealed bid? Is it to get the best price? And if that is the reason, then you have to go that step further: If the utility is bidding, are they going to be held to that price over the life of that contract? Are you going to forego, then, the opportunity to make capital additions and prove to you that they're prudent beyond the life of that contract, realizing that they have the responsibility to keep the lights on?

So it's a multitude of things you have to consider. It's not just whether you score or not; it's if you do this, you have to do B, C and D as well, at least in my opinion.

If you have an independent third-party evaluator, I don't think you can find one besides the Commission. That's my own personal opinion. I don't

think you can find a consulting firm. There will always be litigation over, "Well, they've done work only for utilities," or, "They've only done work for nonutilities," or whatever. The Commission, in my mind, would be an independent evaluator.

Again, then you've gone back to one of the reasons we didn't want bifurcation. We're not recommending that the Commission make those decisions, the utility make those decisions and we review them. All right. That's it in a nutshell. And it's a very convoluted --

COMMISSIONER LAUREDO: Speaking of convoluted --

COMMISSIONER JOHNSON: Tom, explain to me once again the rationale why we don't want the Commission to actually evaluate the bid? I mean, you started by saying that we would be the only entity that would be unbiased but we shouldn't be used because why? Explain that.

MR. BALLINGER: Basically, it's a philosophical difference. I don't believe the Commission should be making the management decisions, they should be reviewing them. Under the statutory, the utility has the statutory obligation to serve. The Commission has the authority, via the grid bill, if we see something is wrong we can mandate the utility to

go, not to make those decisions on the front end.

CHAIRMAN DEASON: Tom, I agree with you except that the statute under which we have to operate puts, in my opinion, a very heavy burden on the Commission. It says the Commission shall ensure it is the most cost-effective unit in the need determination. It doesn't say the Commission shall review to make sure the unit proposed is reasonable or that the costs are reasonable for ratepayers to pay, or anything like that. It says, "It is the most cost-effective." That's a pretty heavy burden.

MR. BALLINGER: Yes, I differ a little bit because it does say consider whether it is the most cost-effective. I don't know that you could interpret it to say that it is the most cost-effective.

CHAIRMAN DEASON: There are a lot of parties that come up here and say that it means the most cost-effective unit.

MR. BALLINGER: I'm probably in the minority on that one.

MR. TRAPP: And I guess the statute, as I understand it, is a determination of need, though. And I think the Commission, again, conventionally has placed the burden of proof on the utility to demonstrate.

It's coupled with your authority under 366, in my mind, where the burden of proof is on the utility to demonstrate what they're doing is prudent. And in this case they have an extra burden; they have to demonstrate that the power plant is the most cost-effective.

Again, it goes back to the reason why we think you should require bidding. Bidding is the best way I know to demonstrate that burden of proof; and, unfortunately, with it comes maybe some other issues with regard to, "Well, did you do a prudent, proper bidding instrument and procedure?" But all of that, it seems to me, should be determined by the Commission in a regulatory fashion in the need determination after the utility has made a decision.

CHAIRMAN DEASON: But let me ask you this: If we're going the allow parties the opportunity to challenge a decision, isn't, in essence, the Commission going to be the final determinator? So why don't we just make the decision up front?

MR. TRAPP: Sure. Again, because I don't think you pay me enough. (Laughter) CEOs get half a million or whatever, and that kind of stuff; vice presidents get, you know, a couple hundred grand, and I don't get anywhere near that, so I would --

(Simultaneous conversation.)

MR. TRAPP: Oh, definitely.

I would prefer the utility do the bulk of the work and have the hard burden of proof, and come up here and just let me ask some leading questions and get to the bottom line of the thing and then make a determination.

I agree with you the Commission is regulators; the buck stops here. You have to make a decision and that decision is going to carry over as a rate impact on customer bills. But, again, regulation versus management.

COMMISSIONER CLARK: That's right. And it's up to them to make that decision. They are charged with running the utility in the most efficient way, and our job is to review that and to make sure we agree with their conclusions or where we don't agree to require them to change it.

MR. TRAPP: True.

CHAIRMAN DEASON: I agree with that in most scenarios. But what we have here is if this is going to be a fair and open process where somebody who feels like they have not been treated fairly has a forum in which to express that concern and hopefully gain relief, the Commission is going to make the ultimate

decision anyway. I think it's going to be extremely rare where there is an RFP issued and the decision is made. And I don't care if the utility chooses itself or chooses another provider, a NUG. There's going to be another NUG out there who is not going to like that decision, and they're going to file a compliant with the Commission. And the Commission is going to have to look at that RFP; they're going to have to look at the scoring criteria; they're going to have to look at the subjective judgments that were made by someone who probably gets paid a lot of money to make those decisions, but ultimately the decision is going to be ours. Do you say, "Yes, it was fair, it was objective, the decision is a correct decision," or do you say, "No, it wasn't"?

MR. BALLINGER: I think you're right, and that decision is telling the utility whether or not they made the right decision or the wrong decision. I don't it should go further to say, "The right decision is this over here."

CHAIRMAN DEASON: Okay. That's a good --

MR. BALLINGER: That's a very fine line.

CHAIRMAN DEASON: All right. What happens then if we go through this long, drawn-out process, which is very complicated and expensive and

time-consuming and the end result is a complaint that's filed with the determination of the winner of the RFP, and the Commission makes the decision that: Complainant, you're correct, it was not done fairly and something was misscored or the subjective criteria were biased? So that just means we start all over again, and then that whole time that window of opportunity narrows and that we're just a year further down the road to where the capacity has to be on line or else the lights go out?

MR. BALLINGER: I would like to think that the threat of regulation is a pretty big threat to the utility that they will pursue the right job and the right plant. Because if that were to happen and we were to find, we have remedies for that situation. Whereas, on a nonutility, we don't; they're a nonregulated entity. So I think the threat of regulation over a utility is very strong for them to come forward with the best project.

CHAIRMAN DEASON: What is our remedy? Would you say, "Well, Utility, you really blew it. We're going to make you build it and you have to do it within two years. And so it's going to cost more because the available technologies are limited but we're only going to allow you recovery as if the other project was built

and you're just going to suffer"?

MR. BALLINGER: That's basically it. You go to the stockholders' pockets.

CHAIRMAN DEASON: And then the cost of capital increases for the utility and the customer is going to pay regardless? I mean --

MR. BALLINGER: That's possible. I agree.

MR. TRAPP: It's happened in other jurisdictions.

CHAIRMAN DEASON: There are no easy answers.

MR. TRAPP: No, sir.

MS. RULE: Well, Chairman Deason, in a sense this very question comes up whenever the utility makes a decision that the Commission must approve. The utility might not make the right decision. What are you going to do? You can either take away that decision-making capability and make that sort of decision yourself, or you can take whatever regulatory action is available to you to show that that is not a prudent decision and you cannot approve it for rate recovery.

This happens to be one specific type of question that's come before the Commission recently in a very public fashion, but it's involved in almost every decision that comes to you for approval.

MR. BALLINGER: Yes.

COMMISSIONER LAUREDO: Okay. And your recommendation is no. Okay.

Let me ask you, you talked about finalists and I'm confused. Under this rule is the utility required to pick finalists of which to pick a winner?

MR. BALLINGER: No.

COMMISSIONER LAUREDO: Huh?

MR. BALLINGER: No. I don't believe so, because I think we have --

COMMISSIONER LAUREDO: Oh, I know it doesn't. You look at (6), and it says, "If you pick finalists, if any."

MR. BALLINGER: Right.

COMMISSIONER LAUREDO: So explain to me how --

MR. BALLINGER: If they feel that based on their project nobody can meet their screening criteria, then they can come to us and say, "We don't even have viable projects that responded to us."

COMMISSIONER CLARK: They can choose themselves.

COMMISSIONER LAUREDO: Well, that was my next question.

MR. BALLINGER: Yes, they can choose themselves, but I don't --

MR. TRAPP: Yes.

COMMISSIONER LAUREDO: So that poses an interesting practical proposition. Then you can conceive of a bidding process by which the utility will disqualify its own IPP.

MR. BALLINGER: Yes, sir.

COMMISSIONER LAUREDO: Are you comfortable in this rule that you're proposing that the arguments that have been expressed in the hearings and in the summaries and stuff from CEPA, that the rule is not biased towards the utility?

I know you premised this whole meeting by saying you didn't care about the parties, you care about the public, as we do. But just on a fairness thing, I just wonder, I'm asking you honestly because I don't know whether, is this you think a very open process by which abuse cannot be -- or at least if abuse is committed by the utility that we can easily flag it?

MR. BALLINGER: I think so. I think it goes a step beyond where we are today in that --

COMMISSIONER LAUREDO: That's a good point. Is this a step towards the IPPs, this rule?

MR. BALLINGER: I think so, especially the IPPs. Because current regulation does not require a

utility to even talk to an IPP, unless you want to carry it that they have the burden of proof to select the most cost-effective alternative. But there's no federal regulation as there is with QFs that they must pay them avoided costs or anything of that nature. There's no guaranteed market for IPPs.

So this has gone a step forward to at least make the utility solicit offerings and justify to us why they rejected such offerings, if they do, as opposed to just doing it all behind closed doors. This at least makes it a formal process before the Commission that they have to justify to us.

COMMISSIONER LAUREDO: And a reversible process.

MR. BALLINGER: Yes.

COMMISSIONER LAUREDO: Because my whole philosophy about this thing is I want to make sure that we move in a direction to accommodate the new forces but not fast enough to dismantle those which have served us so well up to today. That's the bottom line for me. And the rest is all legal jumbo wordage and all that kind of stuff.

You feel comfortable that this is a prudent and cautious step to accommodate new forces while, at the same time, preserving the integrity of all the

other catch phrases we've been using, you know, duty to serve and reliability --

(Simultaneous conversation.)

MR. BALLINGER: You've heard the term "level playing field," we're not quite level. It may still tilt a little bit to the utility, but they have the responsibility. It's nonregulated --

COMMISSIONER LAUREDO: But this rule tilts it a little bit towards the IPP.

MR. BALLINGER: Yes.

COMMISSIONER LAUREDO: Let me ask you. On the question of the finalists, you don't think in light of the discussion about the efficiency of the process that we can name -- I mean we can demand a number, a finite number of finalists so that we don't have, say, ten people apply? And the way we're going, we may very well have ten people apply, ten companies. And if the company decides to select them all, it wouldn't be in the interest of the company, would it, in my scenario, to just -- in other words, as a delay tactic? Because the presumption is we do need the capacity.

MR. BALLINGER: Right. I think also from the IPP perspective, if you had the requirement of, let's say, five finalists; and let's say there was really only four who wanted to go through the rest of the

ahead and bid? And if he loses, makes that an issue and have to counter an argument of not raising it early enough, were there justifications of him not doing it,. And so I think we can sort of let that be for now and see how it works.

CHAIRMAN DEASON: Let me ask a question. I still have a little bit of difficulty with the rule as proposed by Staff, which would require the Utility to provide cost information on its proposal. Nonbinding.

And there's even a statement in your analysis that says that most people who are experts in this industry, when a utility says we need X megawatts in this time frame and in this location, they pretty well know what the utilities' costs are going to be anyway. So why do we go through this exercise of having the utility provide cost information?

MR. TRAPP: I think they do it anyway, Commissioners, to define an avoided unit for conservation purposes because we use the next unit in plan for conservation cost-effectiveness calculations.

MR. BALLINGER: We also may use it for standard offer contracts, which are still on the books for small QFs, which may or may not continue. I don't know, but current regulation, we have a standard offer. So hiding avoided cost is nothing -- I don't see

anything to benefit unless you're going to hold a utility to that cost over the length of plant and total deregulate that plant.

MR. TRAPP: Remember that the utility has a veto right, basically, in this rule at any point in time. They can say, "No, we've decided that we're the best and we can build cheaper and better than you can. So we're closing down or stopping or not doing the RFP process." We would like the information up front to know what the utility thinks their cost is on what their making that decision to go or stop the process on so that we know from the front end on.

CHAIRMAN DEASON: But if this is going to be a level playing field, isn't that a bias against the utility?

MR. TRAPP: I don't think so because, again, this is a regulated entity, which we're regulating, and because we're regulating, they're publishing this cost anyway in the other regulatory arenas that we have. You would have to be a pretty naive competitor not to be able to go dig up these costs, so why not just publish them since they're being published anyway.

MR. BALLINGER: And the real competition is between the other IPPs. They're going to be competing amongst themselves to get in that lowest bid to get to

the negotiating table with the utility to show them that it's a good cost.

CHAIRMAN DEASON: Well, are they going to be competing with the utility with those people because these costs are not binding in any way.

MR. BALLINGER: I understand. They're competing with them, but they are also, in my opinion, their main competition is each other.

COMMISSIONER CLARK: Well, also the utilities --

MR. BALLINGER: Because then those people are on a level playing field with each other. They're all nonregulated, they can structure their financing virtually anyway they want, so they are the ones competing. The utility has so many other different constraints that, yes, they do compete with them but there's so many other factors that may make a good competition.

So I think the competition, as far as getting a good price for the ratepayers, will still happen because you have the nonutility industry competing amongst itself. What you're doing is making the nonregulated entities compete amongst themselves to be providers of electricity for a regulated utility.

CHAIRMAN DEASON: Commissioners, what's your pleasure on Issue 4?

into the crafting of the RFP so that those items are considered.

CHAIRMAN DEASON: I think, and I may be reading this rule entirely wrong, but I think that information is on what the company's plant would be. That if they were going to build, they would build this type plant, this size, this location, with this type technology, and fuel. And they are basically putting that out on the table and saying, "Look folks, this is what we think that we would end up doing, or something very similar to this." Now, that's just the information to the bidders, and the bidders can come in, and they were not obligated. They can come in with something entirely different, perhaps something that is so different and costs so much less that it makes the utility's plan look like they were foolish at one point. But they are not bound in any way by that.

COMMISSIONER KIESLING: Well, that's not what I see on Page 2 in Subsection 4(a), where it says each utility's RFP shall include at a minimum, and it goes through the technical description --

MS. RULE: Commissioner --

COMMISSIONER KIESLING: -- primary and secondary fuel types.

MS. RULE: It talks about a detailed technical

description of that utility's next planned generating unit.

COMMISSIONER KIESLING: Right. Well, doesn't that include whether it's going to be a combined turbine, or --

MS. RULE: That's what the utility would plan, not necessarily what anybody else would propose. It puts the parties, any participants on notice of what the utility intends to do unless somebody else comes up with something better. It does not restrict the depth and breadth of proposals that could be made in response.

MR. TRAPP: If I could, the philosophy, I think, is what is important behind this rule. And the philosophy is that the utility under Florida law has an obligation to serve its customers. And in order to do that it must plan and acquire resources. What this does, basically, it says, "Absent any alternatives in the competitive marketplace, utility, what is your best project in terms of reliability and cost to the consumer, and put that on the table, and we are going to use that as a comparative plant to gauge alternatives against." In order to determine if something is better, you have to compare it to something. So what we are comparing it to is what the

utility would otherwise build. They put that up front in the RFP, saying, "This is what we plan to do, unless you can show us something better." Then it's incumbent upon the bidders in responding to the RFP, to respond to the same types of information with regard to location, water, air, the basic things necessary for a power plant to operate, and then you compare all of those nonpriced parameters and all the priced parameters to the avoided unit to determine whether or not one of the bidders has a better project than what the utility would otherwise build. If they do, that's a winning bidder.

COMMISSIONER KIESLING: When you say you would compare, don't you mean the utility would compare?

MR. TRAPP: The utility would make a management decision and bring it before the Commission for the Commission's approval and judgment.

COMMISSIONER KIESLING: Well, all I can tell you is that having heard bid protests and been involved with bid cases for more than the last ten years, this is the most peculiar bid process I have ever seen in my life. There is no RFP. There is, "I'm going to build this, unless someone comes in and proves that I should, you know, use another proposal." That's not a bid process.

MR. TRAPP: And, again, the philosophy, it was discussed yesterday about this rule, that it is somewhat different, is that because of the utility's obligation to serve in Florida, and because they are a regulated entity, we are suggesting that this rule should be used, or bidding should be used as a tool by the utilities to fulfill their statutory obligations. And it probably does look different than other conventional bid packages.

MR. BALLINGER: It's not a conventional bid. It's a semantical term. We use bidding, and we explained this at the beginning, it's a request for proposals, is what it's making them do. And people can send in a variety of things trying to respond to that proposal. It's not a strict bid where you have specifications out there, meet these specifications, and the best price would win. We use that term bidding interchangeably. But the purpose of this is a tool for the utilities to go out there, beat the bushes with an RFP, saying, "If I build it, I'm going to build it here, this and such, look like this, and costs this much. Show me what you want to propose, and then we'll talk." So it's the mechanism to get them out into the market, solicit from IPPs proposals from which to make an informed decision.

COMMISSIONER KIESLING: Well, I have to differ

with you; that's not what an RFP is, either. And I think there is a big range of cases that define RFP and what one is. And whether you want to define yours differently or not, you know, that certainly is an area for confusion. If you are using the same term that is used in Florida Statutes for RFPs, then yours is not an RFP. An RFP, as it's generally used, and used in statute, is simply a description of what you would like to end up with, and a request that people make proposals to do that. It doesn't allow you to come in and bid for yourself, or to have a proposal of your own that is going to be the default winner.

MR. TRAPP: And it may be the difference lying in that it is a regulated entity as opposed to a government agency going out for a service.

COMMISSIONER CLARK: An entity that has the obligation to provide the end product to the customer at the lowest possible cost.

MR. BALLINGER: It may not be the best choice of words, that's why we put in a special definition for request for proposals, and we made our own definition, if you will. It may not be conforming with the statutes, but we had to use some buzz word to go through it and we have created the definition.

COMMISSIONER LAUREDO: Commissioner, I have some

market in Florida. So we feel that in whole that system does exist.

CHAIRMAN DEASON: I asked this question yesterday, and you basically told me that information is out there anyway. I mean, I was questioning, if you are going to have a fair bidding process, why have the utility divulge anything other than what their basic essential need is? Well, what you're saying is the planning process, the ten-year site plan is avoided, unit cost of avoided units, and evaluation and conservation programs, all of these things, that information is out there anyway because they are a regulated utility.

COMMISSIONER KIESLING: But my problem is, and I still don't have an answer that I understand. You may have given me an answer and I just don't have the sophistication to understand it yet, but what is wrong with having an RFP that is crafted and includes both what the utility says it needs and wants in terms of location and a diversity of fuels, et cetera, and also contains criteria that would be offered from, you know, DEP, or environmental groups, or conservation groups, in order that all of those considerations, all of those criteria are part of the RFP. And then the utility, as well as anyone else that wants to come in and submit a proposal under that RFP, does it.

MR. TRAPP: Again, we think that information, all those criterion are basically required by this rule to be contained in the RFP. The RFP basically says you have got --

COMMISSIONER KIESLING: Let me stop you. Where in this rule does it say that?

MR. TRAPP: Page 3, Line 18 calls for a description of the priced and nonpriced attributes to be addressed by each alternative generating proposal, including technical and financial viability, dispatchability, deliverability, which are interconnection and transmission, fuel supply, water supply, environmental compliance, performance criteria, pricing structure. And then we asked the detailed description of methodology to be used to evaluate alternative generating proposals on the basis of priced and nonpriced alternatives. Those are all the elements that make a power plant.

COMMISSIONER KIESLING: Well, let me just ask you this. Where you say the detailed description of the methodology to be used to evaluate alternative generating proposals, by that you mean the methodology by which the utility will determine whether any of the other proposals are as good, or better than theirs?

MR. TRAPP: Yes, ma'am.

COMMISSIONER KIESLING: Well, who decides the methodology to value the utilities?

MR. TRAPP: The utility has to make a management decision; and the Commission, as economic regulator, has to determine the validity of that decision.

COMMISSIONER KIESLING: Well, then I, again, would just say that is not an RFP, and that is certainly to me not a level playing field.

CHAIRMAN DEASON: And the reason for that is that the utility is the one making the decision? Or could you explain why that's the case in your opinion. Is it not fair because the utility is the entity making the decision, basically evaluating their own proposal against other proposals?

COMMISSIONER KIESLING: Absolutely. And because there is no opportunity for input into methodology, criteria, weighing of the criteria, how that methodology is going to be carried out, from anyone except the utility.

MR. BALLINGER: That gets us back to bifurcation, and the preapproval of these things. A strict scoring mechanism; is that attainable? I agree with you. I mean, it leaves the subjectivity to the utility. But, on the other hand, you have to weigh, can you make it so nonsubjective that it can be scored by someone other

than the utility, or by the Commission, or have a preapproval by the Commission. Staff's intent in this was to not really level the field between the IPP or non-utility generator and the utility, because I don't think it will ever be until we totally deregulate at least generation, because the utility has the obligation to serve. It may only stay slightly tilted. Our intent in the rule is to recognize that slight tilt, but to try to get a better deal for the ratepayer. To try to do something to force the regulated entity that we have some jurisdiction over to go out and get a better deal for the ratepayer. The IPPs will compete amongst themselves, they are going to give their best shot to get a price in to sign with the utility. The utility has the responsibility to evaluate those proposals now, and justify to the Commission why they chose A or chose themselves. And those three are really intertwined, and that's a long series of discussions.

COMMISSIONER CLARK: And it has to do with your basic philosophy.

MR. BALLINGER: Yes, ma'am.

COMMISSIONER CLARK: And one of the things the Governor said this morning sort of has a bearing on this case. The utilities have the responsibility of

would not suffer, the duty to serve would be -- somehow they would inherent that mantle and lower costs, then I would just say fine. But I don't know that. Nor do you, nor do they. And so our quest is how do we move a little bit towards their position, which I think this rule does, without dismantling this system that has worked so fine. That's the way I look at it, very simplistic, Commissioner, with 100 reservations that I have.

COMMISSIONER JOHNSON: As I look at this rule, and I understand, Commissioner Kiesling, your concern, because I had the same first reaction that, "Well, this doesn't level the playing field. This isn't a fair bidding process." And it's not. But, admittedly it's not. Admittedly, that was not the goal. Admittedly, after discussing the issues with Staff, and their expression that the investor-owned utilities have the obligation to serve, they are the ones that are regulated by us, and, therefore, the circumstances dictate that the field isn't level. And in looking at that, and understanding that we do need to take this first step, I think this is a good start. I share the concern of Commissioner Deason that, well, the way we have this process laid out, we are just pretending. We are saying, "Well, we will give the utility the first

shot, but at the end it's going to be appealed, and we are going to have to look at the issue." That's true. However, I think, again, we have skewed it, because once they have made a determination, our level of review will be different. Our level of review -- and I can't put a standard of review on it -- but if we started off in the beginning and we set the rules and the criteria, it would be a fairer process. Tom, you stated yesterday that you thought the Commission would be the unbiased arbiters. However, that's not exactly what we want, and that all we are doing here is taking -- and I hate to state this so bluntly, but this is what I have been hearing from Staff, and that this is the first step, the utilities have the obligation to serve, and that if we truly believe that, then this is the approach that we should take.

MR. BALLINGER: And I'm not convinced that even if Staff did that level of detail, and did the computer simulation, that we would have different results. We have very competent staff that knows how the computer models work, the planning process works, knows how to question, what assumptions change. And it's not only the one-time review when you get a petition, it's the day-to-day that you see cases go on in utilities, and every day events happening that give you a feel with