

State of Florida



Public Service Commission  
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DATE: JUNE 6, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &  
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BROWN, HARRIS) *COH. MCB WJH*  
DIVISION OF ECONOMIC REGULATION (HAFF) *MSA VJS JDT*

RE: DOCKET NO. 020262-EI - PETITION TO DETERMINE NEED FOR AN  
ELECTRICAL POWER PLANT IN MARTIN COUNTY BY FLORIDA POWER  
& LIGHT COMPANY.

DOCKET NO. 020263-EI - PETITION TO DETERMINE NEED FOR AN  
ELECTRICAL POWER PLANT IN MANATEE COUNTY BY FLORIDA POWER  
& LIGHT COMPANY.

AGENDA: 06/18/02 - REGULAR AGENDA - PROPOSED AGENCY ACTION - RULE  
VARIANCE - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020262.RCM

CASE BACKGROUND

In August of 2001, Florida Power and Light Company (FPL) issued a Request for Proposals (RFP) for additional generating capacity to fill its projected capacity needs in 2005 and 2006. FPL evaluated numerous proposals from 15 respondents to the RFP, along with several of its own proposals to supply the needed capacity. In February of 2002, FPL announced that it would not select any of the respondents to its RFP to build its capacity additions, but instead would seek certification of two new power plants it would build itself on its existing Martin and Manatee plant sites. FPL filed its Petitions for Certification of the plants with the Department of Environmental Protection in February

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of 2002, and filed its Petitions for Determinations of Need on March 22, 2002.

Several bidders have sought to intervene in the need determination dockets, including Reliant Energy Power Generation, Inc.; Calpine Energy Services, L.P.; Progress Energy Corporation; CPV Cana, Ltd.; Mirant Corporation; and South Pond Energy.

On April 22, 2002, FPL filed an Emergency Motion to Hold Proceedings in Abeyance, which was granted by the Prehearing Officer on April 26, 2002, in Order No. PSC-02-0571-PCO-EI. On April 24, 2002, CPV Cana filed a Response to the Motion for Abeyance, which also contained a Petition for Waiver of Rule 25-22.080, Florida Administrative Code, regarding the 90 day time period for the Commission to hold a hearing on the need determination petitions.

This Recommendation addresses the Petition of CPV Cana for waiver of Rule 25-22.080, Florida Administrative Code. The Commission has jurisdiction pursuant to Section 120.542, Florida Statutes, and Rule 28-104.005, Florida Administrative Code.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission deny CPV Cana's petition for waiver of Rule 25-22.080, Florida Administrative Code?

**RECOMMENDATION:** Yes. In Order PSC-02-0703-PCO-EI, issued April 23, 2002, the Commission granted an emergency waiver of Rule 25-22.080 in these proceedings; therefore, this petition for waiver is moot. (Harris, Brown)

**STAFF ANALYSIS:** On April 24, 2002, CPV Cana filed a petition for waiver of the Commission's scheduling requirements in Rule 25-22.080, Florida Administrative Code. This filing was made as part of a Response submitted by CPV Cana to FPL's Motion for Abeyance,

DATE: JUNE 6, 2002

filed April 22, 2002, in which CPV Cana asserted that a petition for rule waiver was the correct procedural mechanism to extend the hearing schedule beyond the 90 day period.

In addition to the Petition for Rule Waiver, CPV Cana requested additional relief; namely, that the Commission actively oversee the second RFP process, preclude FPL from making material changes to its RFP document after submittal of bids, preclude FPL from changing its cost data after review of the bids, and preclude FPL from recovering any costs greater than those identified in the RFP for its self-build options if it declares itself the winner.

On May 10, 2002, FPL filed a Motion To Strike Part of CPV's Response. Specifically, FPL asked that the Commission strike those parts of the response which request the Commission take any action other than granting a rule waiver petition; in other words, the conditions described above. FPL argued that those requests constitute affirmative relief, which were not appropriately raised in a response to a motion. CPV Cana responded to FPL's Motion to Strike on May 20, 2002, arguing that the conditions it requested were appropriate under the circumstances, and were in fact appropriate as part of CPV Cana's Petition for Rule Waiver, rather than part of the response to FPL's Petition.

At its May 21, 2002 Agenda Conference the Commission granted FPL's Petition for Emergency Rule Waiver, and CPV Cana orally withdrew its request that the Commission impose conditions on the rule waiver. Part of the discussion concerning CPV Cana's withdrawal involved the fact that CPV Cana's rule waiver petition still remained unresolved.

In light of the Commission's decision to grant FPL's Emergency Petition for Rule Waiver it appears that CPV Cana's Petition for Rule Waiver is moot. As defined by Black's Law Dictionary, "a case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. A question is "moot" when it presents no actual controversy or where the issues have ceased to exist." Rule 25-22.080 has been waived by the Commission, and there is no need for a second waiver. The Commission's granting of FPL's rule waiver effectively eliminated this issue in controversy.

As far as the conditions CPV Cana wishes to place on the second RFP process, staff believes these to be contrary to Florida

Law and therefore recommends the Commission not grant the relief as requested. Section 120.542(1), F.S. states: "an agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved." In this instance, the Commission has granted FPL's emergency rule waiver petition, which accomplishes the underlying purpose of the statute (Section 413.519, F.S.) and the instant rule waiver. The underlying purpose of the need determination statute is accomplished since waiving the ninety day time frame allows FPL to issue a second Request for Proposals process, ensuring the Commission is presented with a project which is the most cost effective alternative available. Since the issue of waiver of Rule 25-22.080, Florida Administrative Code, is moot, and since the remaining relief requested by CPV Cana is not necessary to accomplish the underlying purposes of the statute, staff recommends the Commission deny the Petition for Waiver filed April 24, 2002, by CPV Cana, Ltd.

**ISSUE 2:** Should these Dockets be closed?

**RECOMMENDATION:** No. These Dockets should remain open to address this on-going need determination proceeding. (Harris, Brown)

**STAFF ANALYSIS:** Docket Nos. 020262-EI & 020263-EI are on-going need determination proceedings. Regardless of the Commission's vote on Issue 1, there will be substantial further proceedings before these dockets can be closed. The Order resulting from this Recommendation will be issued as proposed agency action, and affected parties will have 21 days from the date of issuance of the Order to protest this decision. Should this decision not be timely protested, the Order will become final upon the issuance of a Consummating Order.