ORIGINAL

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 Filed: October 2, 2002

CPV GULFCOAST, LTD.'S RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO QUASH SUBPOENA

CPV Gulfcoast, Ltd. ("CPV"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby responds to Florida Power & Light Company's ("FPL") Motion to Quash Subpoena (the "Motion") served on FPL President, Paul J. Evanson to appear as a witness[1] in the Commission's hearing in these consolidated proceedings. For the reasons set forth below, CPV urges that the Motion be denied:

1. FPL, in this consolidated hearing which it has initiated, is trying to prohibit CPV from having the ability to call as a witness the person who has admitted in deposition that he is ultimately responsible for the decisions on which these hearings are based. (No other FPL witness is in the position of being able to make the ultimate decision or to testify regarding the factors that **he**

[1]It should be noted that Mr. Evanson was listed in CPV's Prehearing Statement. When efforts to secure assurances from FPL counsel that Mr. Evanson would appear voluntarily were not successful, CPV was forced to subpoena him. FPL seems to object to Mr. Evanson's attendance at the beginning of the hearing pursuant to the subpoena as being improper. Obviously FPL will go first in the hearing and controls the pace of its case; with clearer input from FPL's counsel CPV would be more than willing to delineate a more specific time for Mr. Evanson and has attempted to do so.

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considered in making that decision. Thus, Mr. Evanson and his testimony is unique.) FPL is, thus, attempting to deprive CPV of a witness with certainly relevant information (or, in the alternative, attempt to require CPV to reveal how it intends to use at hearing an adverse party as a witness). FPL's assertion that its other witnesses will testify to the "same information" that CPV may seek to elicit from Mr. Evanson is clearly speculative.

2. The only Florida case FPL cites as a reason to excuse Mr. Evanson as a witness is Dept. of Rehabilitative Services v. Brooke, 573 So. 2d 363 (Fla. 1st DCA 1991). That case dealt with a separation of powers issue, where the Court, in concluding that the Secretary of the Department of HRS need not appear (at least initially), agreed with the decision in Halderman v. Pennhurst State School and Hospital, 559 F. Supp. 153 (E.D. Penn. 1982). In Halderman, the United States Court, in precluding the calling of the Pennsylvania Secretary for the Department of Public Welfare as a witness, stated that "department heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer." Neither the Brooke case, nor the Halderman case on which it relies, dealt with officers, of any rank, in a private sector corporation.

3. FPL also suggests because counsel for CPV deposed Mr. Evanson and that he would be more than 100 miles from the hearing in Tallahassee (thus making his deposition admissible under the Florida Rules of Civil Procedure) that this should somehow preclude CPV from having the opportunity to present Mr. Evanson as a live witness. Rule 1.330(a)(3), which is permissive in nature, i.e., a departure "may" be used in certain circumstances, can in no way be construed as supporting the proposition that because a witness has been deposed, and his or her deposition may be admissible, that the person cannot also be called as a live witness. If the Rule were so construed, parties would

be unduly constrained in exercising their rights to depose individuals and the Commission's state-wide subpoena power would be severely curtailed.

Moreover, the deposition of Mr. Evanson is clearly not an adequate substitute for his live testimony. The deposition was limited to two hours and was clearly a "discovery" deposition (as contrasted with a deposition designed from the outset to perpetuate testimony and to be used in lieu of a live witness). Moreover, there was at least one question, considered key by CPV, that Mr. Evanson was instructed not to answer, again showing the inadequacies of simply tendering the deposition in place of his live testimony.[2]

4. The standards for quashing a subpoena are set forth in section 120.569(2)(k)1. F.S., which states:

> Any person subject to a subpoena may, before compliance in a timely petition, request a presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.

FPL has failed to establish that any of these statutory grounds for invalidating a subpoena apply in the instant situation.

5. CPV's use of Mr. Evanson as a witness is clearly relevant to the proceedings, given the fact that he is the person at FPL with "overall responsibility" (Deposition of Paul Evanson, p. 7) for the decisions at issue in these hearings. Moreover, as shown by FPL's Response to CPV's First

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[2]The question posed related to a competing bidder, who, but for the equity penalty being imposed on it, proposed a plan that had a lower total revenue requirement than FPL's self-build plan. This bidder has withdrawn from the case and also withdrew it bids. CPV asked whether FPL had entered into a settlement agreement with this bidder and Mr. Evanson was instructed by his counsel not to answer the question. (See Exhibit A, excerpt of deposition of Paul Evanson.) CPV plans to pursue this line of questioning at hearing and, if Mr. Evanson, is again instructed not to answer, seek an order compelling a response.

Set of Interrogatories, Mr. Evanson was clearly the person with the final say in determining the best alternative. See interrogatory No. 15 and the attached response as follows:

> **Q.**
> **Identify who made the decision that FPL won its Supplemental Request for Proposal and when that decision was made. If the decision was made by a committee or group of people, identify all members of the committee or group.**
>
> A.
> The results of the economic analyses performed independently by FPL and Mr. Alan Taylor showed that the All-FPL self build option is the lowest cost alternative to meet FPL's capacity need. Based on these results and on his own review of non-economic factors related to different generation capacity alternatives, Mr. Rene Silva concluded that the All-FPL self build option is the best alternative. Mr. Silva communicated his conclusions and the bases for those conclusions to Mr. Paul Evanson, who concurred.

Similarly, attached as Composite Exhibit "B" are e-mails reflecting Mr. Evanson's involvement in various aspects of the RFP decision-making process.

FPL's assertions that Mr. Evanson will only provide "redundant and cumulative testimony" is clearly speculative and FPL has not met its burden of proof establishing a basis for quashing the subpoena. See Bernstein v. Bernstein, 498 So. 2d 1270, 1271 (Fla. 4th DCA 1986) ("The burden of proof is ordinarily upon the party moving for relief . . ."). Finally, the Brooke case does not protect private sector corporate officers, particularly in administrative hearings that are initiated by the corporation involved.

WHEREFORE, CPV requests that the Commission deny FPL's Motion to quash the subpoena of PAUL EVANSON.

Respectfully submitted,

MOYLE, FLANIGAN, KATZ, RAYMOND
& SHEEHAN, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301
(850) 681-3828 (telephone)
(850) 681-8788 (facsimile)

By: _____
JON C. MOYLE, JR.
Florida Bar No. 727016
CATHY M. SELLERS
Florida Bar No. 0784958

Attorneys for CPV Gulfcoast, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to those listed below with an asterisk and by U.S. Mail to those listed below without an asterisk on this 2nd day of October, 2002:

*Martha Carter Brown, Esquire
*Larry Harris, Esquire
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Jack Shreve, Esquire
Office of the Public Counsel
c/o Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400

*Charles A. Guyton, Esquire
Steel, Hector & Davis, LLP
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301

Mr. William G. Walker, III, Vice-President
Florida Power & Light Company
215 South Monroe Street, Suite 810
Tallahassee, Florida 32301-1859

*R. Wade Litchfield, Esquire
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 22408-0420

*Joseph A. McGlothlin, Esquire
*Vicki G. Kaufman, Esquire
McWhirter, Reeves, et al.
117 South Gadsden Street
Tallahassee, Florida 32301

David Bruce May, Esquire
Holland & Knight, LLP
315 South Calhoun Street, Suite 600
Post Office Box 810
Tallahassee, Florida 32302-0810

*Michael B. Twomey, Esquire
Post Office Box 5256
Tallahassee, Florida 32314-5256

By: _____
Jon C. Moyle, Jr.

they know how I act and think, they might tell me more. But certainly on important items, they obviously let me know ahead of time.

Q. To the extent that a settlement obligated FPL to take a position in something in the future, would you expect that that would be brought to your attention?

A. Again, depending on how important it is. If it was important, they would. If it was unimportant, they might not.

Q. As the president of FPL, would you be surprised if a settlement were entered into, a formal written settlement, without your knowledge?

A. A settlement of?

Q. Of any claims in a need case?

A. Well, I'm finding it a little difficult to visualize what it is that you are referring to. So all I can fall back on is if it is an important item, I should be aware of it, should have been made aware of it.

Q. But my follow-up question was, To the extent that it obligated you to take a position or not take a position --

A. It depends on whether the position was an important one or insignificant one, you know.

Q. Who gets to make those decisions about whether it's important or insignificant? Is that something that

you delegate to your staff?

A. Well, I think most of them have worked with me long enough to know what I consider important and not. And if they don't understand that distinction, they find out pretty quickly. They don't make the mistake twice.

Q. Are you familiar with Steve Sim?

A. Yes.

Q. Do you know him to be a trustworthy individual?

A. I do.

Q. I'm going to ask you to read a portion of his testimony, of his rebuttal testimony that is found on Page 16, starting on Lines 2 and ending on Lines 4. And I'd ask you just to read it to yourself.

A. Okay.

Q. Without identifying the bidder, what does that statement mean to you?

A. Well, number one, that's not my understanding of the facts of this particular case. But number two, it would suggest that the way he states that that but for the equity penalty, one bidder was lower or one combination of one bid was lower than the FPL proposal.

Q. So if that were true, then that would mean that there was a proposal out there that beat the FPL proposal if the equity penalty were not imposed?

MR. LITCHFIELD: I object to the form of the

question. The equity penalty was not imposed in this case. This issue has been aired add nauseam in other depositions, so I would ask Counsel to rephrase it.

BY MR. MOYLE:

Q. We have a little bit of a running debate about whether the equity penalty has been imposed or applied. So let me ask you --

A. Well, I would like to define that it is the cost.

Q. Would you agree, if this statement were true, then that there was another bid out there to the extent the equity penalty issue were not considered in the analysis, that the other bid would have been lower than you all, the FPL bid?

A. Can I look at that one more time? Could you repeat the question?

Q. Assuming that statement is true, would you agree that without the equity penalty being factored in that there was another proposal or another bidder out there that would have beaten the all-FPL plan?

MR. LITCHFIELD: I'll object to the form of the question. I think you indicated proposal or bidder. That's a compound question.

THE WITNESS: Well, it suggests that. It

doesn't really state it, but it would suggest that which is frankly not my understanding of it.

BY MR. MOYLE:

Q. Do you know why this other bidder that was identified here is no longer in the case?

A. I think that's between the other bidder to deal with why somebody is or isn't.

Q. Right. I'm asking you if you know?

A. I'm not sure why.

Q. Do you know if FPL has entered into a settlement agreement with this other bidder?

MR. LITCHFIELD: There I will object, because whether there is or isn't, that fact alone would disclose potential settlement communications. So I would ask the witness not to answer that question.

MR. MOYLE: Well, I disagree, because I'm not asking about any of the terms of the settlement. I'm asking simply whether this is a settlement agreement.

MR. LITCHFIELD: And that fact alone could be confidential as between the parties. As you know, settlements are entered into all the time. And a typical term of settlements is that the fact of the settlement alone may be confidential. So I think by the witness indicating one way or the other whether

there is or isn't a settlement that that fact alone could cut across settlement communication privilege.

MR. MOYLE: I'm not aware of a privilege related to settlement communications; attorney-client, work product, whatnot.

MR. LITCHFIELD: Are you suggesting that you have a right to know whether a settlement was entered into in this proceeding?

MR. MOYLE: Yes.

MR. LITCHFIELD: Under what theory?

MR. MOYLE: Well, let's work through it. You'll see. So are you instructing the witness not to answer as to whether a settlement has been entered into with the bidder identified in Mr. Sim's testimony on Page 16?

MR. LITCHFIELD: I am.

MR. MOYLE: Okay. Well, I'll tell you how I think it's relevant. To the extent that a settlement agreement has been entered into with a bidder that has a lower cost alternative, that cuts against your argument that it's -- that your self-build plan is the least cost alternative. Okay?

And to the extent that the statutory obligation is to go with the least cost alternative and there's

another bid out there that has that least cost alternative, and in order to not select them or whatnot you enter into a settlement agreement with them, I think it runs counter to the purposes of the statute and to the bid rule, and is against the interest of the ratepayers in that they are not getting the best possible deal that's out there.

MR. LITCHFIELD: Well, your argument assumes first that the bid rule requires that the company enter into a contract with the absolute low cost bidder. It also assumes that the equity penalty would not be reflected in the analysis. And it also assumes that the bidder didn't withdraw of its own volition. And that the bidder otherwise would have entered into a contract with FPL.

And that FPL, had the bidder remained in the mix, and had the equity penalty not been applied and all of the other things that we've just discussed or I just mentioned were in effect, that the bidder and FPL were able to work through negotiations to effect an agreement, which in itself could be quite an ordeal. And by no means it guaranteed a contract would be entered into. So I think the premise is somewhat speculative.

And I still maintain that whether or not a

settlement was entered in itself could be considered confidential. And therefore, were there a settlement, if Mr. Evanson in answering this question could violate a term of the settlement agreement in that respect.

MR. MOYLE: We'll let the commission sort this one out.

MR. LITCHFIELD: I think that's probably what we need to do.

THE WITNESS: Could I add one footnote to that?

BY MR. MOYLE:

Q. Sure.

A. I'm listening to my Counsel. But I would say as to that particular company that was mentioned on that page, its credit rating is such that we would not under any circumstances grant the RFP to them.

Q. So even if they were lower, you are testifying that --

A. I am absolutely testifying to that. Their financial condition is so weak and so poor that it would be imprudent for us to do that, to sign a contract because of number one. And number two, I think that they should not have even bid given our requirements or statements in the RFP. And I think if you approached Moray Dewhurst, our CFO, he would be appalled at even the

Sam Waters
04/19/02 10:00 AM

To: Armando Olivera/EXEC/FPL@FPL
cc:
Subject: Re: Terms and Conditions in Reissuance of RFP

The descriptions in the RFP are very generic. For example, we say that we will have a contract with pay-for-performance, but we do not give a formula. That would be part of a negotiated deal. Our intent was to tell them the general terms and conditions so they could frame a bid, but that a detailed contract would be negotiated after the short list is created. I'll send you a copy of the original RFP so you can see the specifics.

The pricing, availability, energy costs are requested in a specific format, so that can easily be transferred to contract terms. We ask for $/kw-mo, a guaranteed heat rate, availability, etc.

If you have any other questions, give me a call.

Armando Olivera

Armando Olivera
04/19/02 09:27 AM

To: Sam Waters/RAP/FPL@FPL
cc:
Subject: Re: Terms and Conditions in Reissuance of RFP

How are the financial aspects of this treated?
Does the RFP include the terms and conditions for how they are going to be paid or will that be negotiated later? This will undoubtedly have a big impact on the valuation each bid so I assume that there is something already that describes the calculation of capacity payments, energy costs, etc.
If you have it, I would like to see a summary of the financial terms and conditions as well as the operating terms (dispatch rights, availability, capacity levels, etc.).
Sam Waters

Sam Waters
04/18/02 06:07 PM

To: Paul Evanson/EXEC/FPL@FPL, Bill Walker
cc: Charles A Guyton, Armando Olivera/EXEC/FPL@FPL, Anne M Grealy, Steve R Sim/RAP/FPL@FPL, Mario Villar@FPL, Delia Perez-Alonso@FPL, Tony Rodriguez/PGD/FPL@FPL
Subject: Terms and Conditions in Reissuance of RFP

Aside form the issue of moving/changing the avoided units in our RFP, there are several terms and conditions that bidders have objected to which should be addressed before we reissue an RFP:

- Completion Security
- Length of time the bid must remain open
- Regulatory Out Provisions
- Legislative Out Provisions

Completion Security

In the RFP, FPL requested completion security of $50,000/MW, with the right to draw upon that amount in full or terminate the contract if the developer is as little as 1 day late. There does not seem to be an objection to the amount, rather it is the right to fully draw down the fund and terminate at FPL's discretion that bothers the bidders. We do state that this is only a preference, and that we may extend the in-service date up to 5 months for them to cure, but they have filed a complaint here nevertheless.

Composite Exhibit "B"

Suggested remedy: Maintain the $50,000/MW level of security. FPL will draw down on a daily basis in the amount of the greater of replacement power cost, or $330/MW per day (assumes a maximum 5 month cure period) until the funding is exhausted, at which time the contract will be terminated if the nonperformance is not cured. We should recognize that with any contract, the failure to perform is only backed up by dollars, and we are left holding the reliability bag.

Length of Time the Bid Must Remain Open

FPL asked for bids to remain open for 390 days, on the basis that we needed to rely on the bids until contract negotiations and licensing were completed. Bidders have complained this is way too long and that a more reasonable period is 120 days.

Suggested remedy: Request bidders to hold bids open for 120 days minimum. For those bidders whom we select for active negotiation, ask that bids remain firm until a contract is negotiated and a need determination or cost recovery decision is rendered by the Commission.

Regulatory Out Provisions

The RFP specified that FPL would have the right to terminate a contract if any regulatory agency, specifically the PSC or FERC, disallowed any portion of the contract costs for cost recovery. This is beyond the "regulatory out" provisions that the Commission has approved in the past.

Suggested remedy: Return to the old form of the regulatory out provision that states that FPL will simply not pay that portion of the contract costs not allowed for cost recovery. The bidders will still complain, but it is less onerous, and certainly far less risk than our right to cancel the contract. It is entirely possible that the Commission would throw this out if they have any say in the contract design. They have rejected it in recent Standard Offer contracts.

Legislative Out Provisions

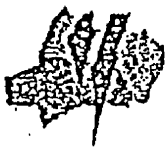
The RFP stated that FPL desired the right to terminate or shorten the contract if the legislature, either state or federal, changed the regulatory structure in Florida, specifically, if merchant developers were allowed to build in Florida. It's a little ironic that they complained about this one, but,

Suggested remedy: Drop this provision.

Other possible issues: Although it has not formally arisen, the issue of FPL not offering its sites for development lurks with Staff. I think it is very unlikely to come back. We have also not addressed in great detail the full range of contractual provisions we would ask for in negotiations. I think less is more in this regard. In the contract we are developing, there is far more detail on nonperformance issues, as well as our rights to dispatch, control, etc. The RFP was never intended to be an exhaustive presentation of all of the terms and conditions we would request, just a general indicator of what we wanted.

We can discuss these issues further at our Monday meeting. If you have any questions or comments, please feel free to call me.

Sam



Sam Waters
10/31/01 11:31 AM

To: Paul Evanson/EXEC/FPL@FPL, Armando Olivera/EXEC/FPL@FPL, Bill Walker, Mario Villar@FPL, Anne M Grealy, Rene Silva/PGBU/FPL@FPL, Bob Fritz/FPL Energy/FPL@FPL, Bill Yeager/PGBU/FPL@FPL
cc: Moray Dewhurst/FNR/FPL@FPL, Tony Rodriguez/PGD/FPL@FPL, (bcc: Steve R Sim/RAP/FPL)
Subject: RFP/Generation Strategy Meeting, Friday, Nov. 2

The purpose of our meeting this Friday will be to discuss our strategy in responding to the bids received addressing our RFP, as well as the longer-term generation strategy. Tomorrow, I will be forwarding materials to you that include a proposed strategy, and the latest results we have from analysis of the RFP responses and the preliminary estimates for FPL projects.

I have to caution everyone that we will not have a proposed short list of bidders or anything approaching a final result of the analyses. The form of the bids resulted in nearly 80 combinations of pricing and terms, and we are still looking at all of the possible combinations. I am going to try and indicate what projects appear to be floating to the top, and give some indication of how our repowering and new combined cycle projects might stack up against them.

My intent is to develop a consensus on direction for our generation plan, i.e. do we want to build or buy, or a combination of both? What kind of projects do we want to be involved in? How long should we be buying for, if that is the choice? Should FPLE be involved in the projects? etc. While I will propose an approach, I am looking forward to a lively discussion given the many issues we identified at the last meeting.

If you have any issues or questions you would like to include in the meeting, please feel free to call me.

Exhibit No. _____

Sam Waters
02/22/02 03:41 PM

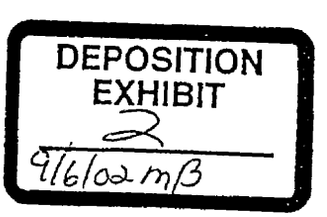
To: Paul Evanson/EXEC/FPL@FPL
cc:
Subject: FPL's Need Determination Case

Paul -

In the course of preparing our filing for the Need Determination Case, we have become aware of flaws in the computer model we used to determine our answer. For example, the program rejected a plan that fell short of a 20% reserve margin in one year, although the shortage was less than 1 MW. We also have some differences in cost calculations for our units within the model. We stumbled upon these as we recreated our results and the history of analysis. Bottom line is we have found a new plan that is closer to the all FPL plan than what I presented to you and the management team earlier. It looks like we are going in with a case based on the FPL plan being break-even with a plan consisting of both FPL and non-FPL options. I don't know for sure yet because we need to get transmission numbers, which will be in middle of next week.

While this is personally discouraging because of all the effort put into the analysis, I still believe we have a strong case, and we should get approval for Martin and Manatee based on the facts of the case. I don't like last minute changes any more than you do, but better we catch them now rather than during the discovery in the case. When I know the final damage, I'll let you know, but I didn't want to sit on this until all the work was done. Please call me if you would like to discuss.

Sam



Docket Nos. 020262-EI, 020263-EI
Exhibit No. _____

Rene Silva
06/27/2002 06:03 PM

To: Paul Evanson/EXEC/FPL@FPL
cc:
Subject: Meeting with El Paso - Evaluated Cost

Paul: We summarized to El Paso, before FPSC Staff, 4 cost-related points. (1) Their bid was (already) not in the lowest cost combination, and again invited them to lower it; (2) By changing their proposal to a "contingent energy delivery contract" the plant availability they had been evaluated at was overstated, and an adjustment would result in a higher evaluated cost for their bid; (3) Now that they have clarified that the only pipeline that, with certainty, can deliver gas to Belle Glade is through FGT AND also NUI (a local gas distribution company) (Not Gulfstream), we now know that the cost of fuel to their plant would go up by at least 20 cents/MMBtu - that's an increase of at least 5% on ALL the fuel, and (4) the heat rate they sent us for the evaluation, which was supposed to be average over time, was the all-time best, which they estimate to be 3% lower than the average - here's another 3% increase we have to add to the evaluated cost of fuel. They only argued regarding point number (2). We told them we needed to adjust our economic evaluation with these new numbers - and any new numbers they give us by Monday - and will communicate to them our decision based on the new information. I can brief you in greater detail tomorrow. We agreed not to meet with El Paso tomorrow. Rene

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Sam Waters

04/20/02 09:20 PM

To: Paul Evanson/EXEC/FPL@FP
cc: Anne M Grealy, Armando Olivera/EXEC/FPL@FPL, Bill Walker, Charles A Guyton, Delia Perez-Alonso@FPL, Mario Villar@FPL, Steve R Sim/RAP/FPL@FPL, Tony Rodriguez/PGD/FPL@FPL
Subject: Credit Ratings of Bidders and Ranking of Prior Bids

In preparation for Monday's meeting, attached is a file showing the current credit ratings of the developers who bid in response to our previous RFP. I have not yet found ratings for El Paso, Competitive Power Ventures or Tractabel. Our RFP carried a requirement that a bidder should be able to show a credit rating of BBB or better from 2 rating agencies, one of which must be Moodys' or S&P. If they cannot, then they are required to post additional security. At this time, Calpine, AES and Mirant do not meet the minimum requirements. We did not say they could not bid, only that they must address their deficiencies through additional security. However, this criteria would definitely weigh against them if they cannot show a reliable form of security.

The attached spreadsheet also shows roughly where each bidder's proposal(s) ranked by quartile in the previous analysis. You should also know that if AES is removed from the bidder's list, any project we select other than FPL would add at least $100 million, NPV to costs. In other words, the one AES bid was really the only thing that made any alternative portfolio competitive.

bidderranking.x

Developer	Quartile	Moody's	S&P	
AES	1	Ba1	BB	Some proposals in quartile 2 and 3
PG&E	1	Baa2	BBB	
Calpine	1	B1	B+	Some proposals in quartile 2,3,4
Enron	2	Ca	D	
Reliant	2-3	Baa3	BBB	
Mirant	3	Ba1	BBB-	
El Paso	3			
Sempra	4	A2	A-	
CPV	4			
Constellation	4	Baa1	A-	
Progress Energy	3	Baa1	BBB+	
Tractabel	3			
Teco	4			
FPC	1			
Southern	4			

Quartile is percent of proposals, not percent of developers

Duke Energy	A1	A+