

**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 14, 2002

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**POST-HEARING STATEMENT, PROPOSED FINDING OF FACTS  
AND PROPOSED CONCLUSIONS OF LAW OF CPV GULFCOAST, LTD.**

Pursuant to Sections 120.569 and 120.57(1), Florida Statutes, Rule 28.106.215, Florida Administrative Code (F.A.C.), and PSC Order No. PSC-02-0992-PCO-EI, CPV Gulfcoast, Ltd. ("CPV") files its Post-hearing Brief, which consists of its Post-hearing Statement, Proposed Findings of Fact and Proposed Conclusions of Law.

**I. ARGUMENT**

CPV maintained in its opening statement that Florida Power and Light Company's ("FPL") need determinations should not be granted by this Commission for at least three distinct reasons. First, FPL's Request for Proposal ("RFP") process and certain terms of the RFP were not fair. Second, FPL failed to comply with Rule 25-22.080, F.A.C., by failing to set forth the methodology and related criteria by which the bids received in response to the RFP would be judged. Third, FPL was unable to meet its burden of proof that its Manatee 3 and Martin 8 power plants were the most cost-effective units to meet its declared need. The evidence adduced

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at the final evidentiary hearing in this proceeding clearly supports CPV's assertions set forth above. Herein, CPV will briefly discuss the evidence supporting its three points in this argument section of its post-hearing brief. Specific findings of fact supporting CPV's position will be set forth in Section III, entitled "Proposed Findings of Fact."

The RFP process and terms of the RFP were not fair. While FPL would have the PSC focus on the sheer volume of documents as evidence that somehow the RFP process was thorough and fair, CPV points to key pieces of evidence that show the RFP was indeed not conducted fairly and certain terms of the RFP were not fair. For example, the only internal document that FPL prepared describing in detail how the bids would be evaluated, a document prepared by Ms. Daisy Iglesias, before the initial RFP was released, set forth a process by which FPL's construction group would aggressively estimate its numbers after being made aware of the price figures of competitors. FPL would evaluate outside bids as compared with FPL's self-build options. If an outside proposal was lower than FPL's self-build option, FPL would go back to its construction group to get them to further lower its numbers. This process was designed to continue until FPL "won" the bid. The evaluation plan then called for FPL to use the EGEAS model to "confirm" that its self-build option was the winner. FPL would then present its results to management. The person in charge of running the EGEAS model to evaluate outside bids also prepared FPL's only internal document proposing how the evaluation be conducted. That the document was created by Ms. Iglesias is not surprising, and, indeed, is consistent with other facts established at hearing. FPL's Power Generation Division, the construction group within FPL that provided the "aggressive" construction numbers called for in Ms. Iglesias evaluation plan, had a business strategy of keeping competition out of its territory and building its own

units. This uncontroverted evidence is telling. Further, evidence reflected that FPL really never wanted to do business with outsiders, and preferred its self-build options. This fact can be gleaned not only from the testimony of FPL's own witnesses, but also from FPL's course of conduct in evaluating the bids. For example, FPL witness Silva spoke of FPL's preference for its own units, pointing out that FPL could not hope to replicate by contract the rights provided to it by owning its own plant. FPL's refusal to admit that a document labeled at the top as a "Short List" was such, and its reasons for not meeting with any of the five companies listed on the short list, with one exception, shows FPL was not truly interested in meeting its need with outside proposals. Finally, terms like the "legislative out" provision contained in the original RFP and the "regulatory out" and equity penalty provisions found in the Supplemental RFP, unfairly gave FPL a significant advantage over the outside bidders.

Furthermore, FPL failed to set forth the criteria and methodology by which the competing bids would be judged. One of the requirements of Rule 25-22.082, F.A.C., commonly known as the "Bid Rule," is to inform prospective bidders regarding the process and standards by which their bids would be judged, *i.e.*, the methodology to be employed. While FPL provided some general information about the way in which bids might be judged, it was limited and non-definitive. For example, FPL's Supplemental RFP stated that "[d]epending upon the capacity size (MW) offered in firm capacity and energy proposals and FPL's resource needs, a proposal may be evaluated by itself and/or in combination with other proposals." Informing bidders that their bids may be grouped is not particularly helpful, particularly when it turned out the groupings FPL compiled rendered each bid with a grouping wholly dependent upon all the other bids within that same group. This methodology, a key component in how FPL

evaluated the bids, was not disclosed up front to the bidders, other than to mention that such groupings may occur.

Moreover, FPL used a host of criteria in evaluating its self-build option against the outside proposals that were never disclosed to the bidders in the RFP. Using criteria in evaluating FPL's self-build options and competing bids that was not disclosed in the RFP is unfair and violates Rule 25-22.082. This rule requires that FPL set forth the methodology, price, and non-price factors that will be used to evaluate bids. Among the criteria that the evidence showed was considered, but not disclosed to the bidders in advance of bid submittal was: 1) preference for projects on existing sites rather than "greenfield" sites; 2) an amorphous criterion referred to as "contractual commitment"; 3) experience in the Florida labor markets; and 4) whether turbines committed to by FPL Group would be used in the projects. Furthermore, the methodology used to evaluate competing bids included imposing an "equity penalty." FPL could have advised bidders of the way in which the equity penalty would be imposed but neglected to do so. Indeed, FPL should have simply set forth the formula by which outside bids would have equity penalty imposed on them. However, FPL simply inserted one sentence in the Supplemental RFP that the cost of capital to FPL would be considered. This is tantamount to not disclosing the price and non-price attributes as required by the Bid Rule and constitutes sufficient ground on which to deny FPL's petition for determination of need.

Additionally, FPL did not establish that its two projects are the most cost effective alternative. (In fact, with respect to the Martin 8 unit, FPL even failed to establish that the unit was needed in 2005, because the 15 MW shortfall the unit was designed to meet could have been obtained from other sources. Alternatively, FPL's voluntary business practice of striving for a

20% reserve margin could be met by simply rounding up the reserve margin represented by only the Manatee unit, from 19.92 %, to 20%.) The bidding process was competitive. By FPL's own testimony found in the rebuttal of Steve Sim, one other bidder had a project with lower revenue requirements than FPL. However, FPL settled with this bidder, who previously had intervened in the need determination proceeding, thus removing this lower cost alternative from the Commission's active consideration. FPL's actions in settling with a lower cost bidder should not be rewarded by granting its need determination petitions. The PSC should find that FPL failed to prove it was the most cost-effective alternative on these facts alone.

Finally, the uncontroverted evidence is that FPL's construction unit wanted to "win" the RFP. It compiled the cost, price, and other numbers tendered in this proceeding, and on what it asks this Commission to rely, based solely on estimates. With respect to the Manatee and Martin units, no contracts exist for any of the major cost components, such as steam turbines, heat recovery generators, combustion turbines, engineering, construction, or gas transportation. FPL indicated that it only had contracts for certain environmental permitting work and legal work associated with these proceedings. Nevertheless, FPL asks this Commission to accept these numbers and grant its need determinations on the strength of mere estimates, which are likely to markedly change. FPL expert Taylor pointed out his view of the uncertainties and potential problems associated with bids as compared to contracts. While Mr. Taylor provided this testimony in an effort to undermine the price certainty of bids received by FPL, his reasoning is equally applicable to estimates, or quotes received by FPL for the major cost components of both these power plants. The Commission should not grant FPL's need determinations as being the most cost effective alternatives on these facts, when FPL's Chief Financial Officer testified that

FPL will not be bound by the numbers represented in its self-build options, and reserves the right to seek additional relief from the Commission at some point in the future if needed. Simply put, FPL has not satisfied its burden to prove that its self-build option is the most cost effective alternative, and this Commission should not accept FPL's two self-build proposals as the "most cost-effective alternative available" based on FPL's estimates, which likely are subject to change.

## **II. STATEMENT OF BASIC POSITION AND POSITION ON ISSUES**

As required by the Prehearing Order, CPV sets forth its basic position and its position on each issue.

The FPL self-build options are not the most cost effective alternative. The RFP was not conducted in a fair and impartial manner. FPL's self-build cost estimates are not based on firm numbers but on aggressive estimates. FPL cannot meet its burden of proving its self-build options are the most cost effective alternatives when it has failed to enter into contracts for the major cost components of its self-build proposals, rejected bids that the RFP required to be firm, and refuses to be bound by the terms of its self-build cost estimates. Further, FPL did not properly account for certain risks associated with its self-build option and unfairly imposed an equity penalty further casting uncertainty and doubt on the objectivity of its analysis.

FPL conducted its RFP in an unfair manner that was inequitably skewed to favor FPL's self-build options. The RFP and evaluation was designed to favor FPL's self-build options. All the criteria used to evaluate responses to the RFP were not disclosed to bidders in advance of the bids being submitted, disadvantaging the bidders.

## STATEMENT OF ISSUES AND POSITIONS

### NEED FOR ADDITIONAL GENERATING CAPACITY

**ISSUE 1:** Does Florida Power & Light Company have a need for Martin Unit 8, taking into account the need for electric system reliability and integrity?

**CPV**

**Gulfcoast:** No. Other options are available to meet FPL's 15 MW need in 2005, including rounding up its 19.92% reserve margin to 20%.

**ISSUE 2:** Does Florida Power & Light Company have a need for Manatee Unit 3, taking into account the need for electric system reliability and integrity?

**CPV**

**Gulfcoast:** While FPL may have a need for Manatee Unit 3 in 2006, the process it used to fill that need, along with its failure to secure firm contracts for the major cost components of the Manatee Unit 3 unit results in the Manatee Unit 3 not being the most cost effective alternative. Thus, ratepayers are not benefitted and the petition should be denied.

**ISSUE 3:** Does Florida Power & Light Company have a need for Martin Unit 8, taking into account the need for adequate electricity at a reasonable cost?

**CPV**

**Gulfcoast:** No. FPL's 15 MW shortfall in 2005 to meet a 20% reserve margin can be met through other means, including rounding FPL's projected 19.92% reserve margin to 20%

**ISSUE 4:** Does Florida Power & Light Company have a need for Manatee Unit 3, taking into account the need for adequate electricity at a reasonable cost?

**CPV**

**Gulfcoast:** While FPL may have a need for Manatee Unit 3 in 2006, the process it used to fill that need, along with its failure to secure firm contracts for the major cost components of the Manatee Unit 3 unit results in the Manatee Unit 3 not being the most cost effective alternative. Thus, ratepayers are not benefitted and the petition should be denied.

**CONSERVATION:**

**ISSUE 5:** Are there any conservation measures taken by or reasonably available to Florida Power & Light Company that might mitigate the need for Martin Unit 8?

**CPV**

**Gulfcoast:** CPV adopts the position of PACE.

**ISSUE 6:** Are there any conservation measures taken by or reasonably available to Florida Power & Light Company that might mitigate the need for Manatee Unit 3?

**CPV**

**Gulfcoast:** No position.

**FUEL AVAILABILITY:**

**ISSUE 7:** Has Florida Power & Light Company adequately ensured the availability of fuel commodity and transportation to serve Martin Unit 8?

**CPV**

**Gulfcoast:** No. It has failed to secure firm contracts for fuel supply or transportation.

**ISSUE 8:** Has Florida Power & Light Company adequately ensured the availability of fuel commodity and transportation to serve Manatee Unit 3?

**CPV**

**Gulfcoast:** No. It has failed to secure firm contracts for fuel supply or transportation.

**COST-EFFECTIVENESS:**

**ISSUE 9:** Did Florida Power & Light Company's Supplemental Request for Proposals, issued on April 26, 2002, satisfy the requirements of Rule 25-22.082, Florida Administrative Code?

**CPV**

**Gulfcoast:** No. FPL listed a methodology to be used to evaluate alternative generating proposals which was not followed. Additional criteria, not listed in the supplemental RFP, were used in evaluating bids. FPL failed to describe



how the equity penalty would be applied. Because the bid was not conducted in a fair and impartial manner, the rule also was violated.

**ISSUE 10:** Was the process used by Florida Power & Light Company to evaluate Martin Unit 8, Manatee Unit 3, and projects submitted in response to its Supplemental Request for Proposals, issued on April 26, 2002, fair, reasonable, and appropriate?

**CPV**

**Gulfcoast:** No. FPL used criteria not disclosed to bidders in evaluating its self-build options against other bids. It also evaluated outside bids using criteria, such as contractual certainty, that was not disclosed to the bidders in the Supplemental RFP.

(a) Did FPL administer the evaluation process so as to provide to non-FPL participants a fair opportunity to win the RFP?

**CPV**

**Gulfcoast:** No. FPL designed an evaluation process to favor its self-build options and assure that it would be “the winner” of the RFP. For example, it made experience in the Florida labor market an evaluation criterion, thus ensuring that a number of proposals from certain bidders would not be evaluated favorably.

(b) Did FPL apply to its self-build options the standards and criteria that it applied to respondents?

**CPV**

**Gulfcoast:** No. FPL did not impose on itself the requirement that payments received by bidders be limited to their bids. FPL did not give assurance that its self-build projects would be available on time, supported with a completion guarantee, something that was required of all other proposals.

(c) Were the evaluation criteria used by FPL in evaluating the bids disclosed to the bidders prior to the submission of bids?

**CPV**

**Gulfcoast:** While some evaluation criteria was disclosed to bidders prior to submitting bids, a number of criteria were not disclosed, something that is fundamentally unfair.

**ISSUE 11:** In its evaluation of Martin Unit 8, Manatee Unit 3, and projects filed in response to its Supplemental Request for Proposals, issued on April 26, 2002, did Florida Power & Light Company employ fair and reasonable assumptions and methodologies?

- (a) Were the assumptions regarding operating parameters that FPL assigned to its own proposed units reasonable and appropriate?

**CPV**

**Gulfcoast:** CPV Gulfcoast adopts the position of PACE.

- (b) When modeling and quantifying the costs of all options, did FPL appropriately and consistently quantify and take into account the impact of variable O&M costs associated with bidders' proposals and variable O&M costs associated with its own self-build options, so as to result in a fair comparison of purchased and self-built alternatives?

**CPV**

**Gulfcoast:** CPV Gulfcoast adopts the position of PACE.

- (c) When modeling and quantifying the costs of all options, did FPL fairly and appropriately compare the costs of projects having different durations?

**CPV**

**Gulfcoast:** CPV Gulfcoast adopts the position of PACE.

- (d) When modeling and quantifying the costs of all options, did FPL employ assumptions regarding the gas transportation costs for the proposals that were fair, reasonable, and appropriate?

**CPV**

**Gulfcoast:** CPV Gulfcoast adopts the position of PACE.

- (e) When modeling and quantifying the costs of all options, including its own, did FPL appropriately and adequately take cycling and start-up costs into account?

**CPV**

**Gulfcoast:** CPV Gulfcoast adopts the position of PACE.

- (f) When modeling and quantifying the costs of all options, did FPL appropriately and adequately take into account the impact of seasonal variations on heat rate and unit output?

**CPV**

**Gulfoast:** CPV Gulfoast adopts the position of PACE.

- (g) Did FPL act in a fair, reasonable and appropriate manner in not considering further a proposal from TECO on the basis that TECO's reserve margin requirements might be impaired?

**CPV**

**Gulfoast:** No. FPL decided not to further consider a competing proposal from TECO based on a concern that TECO's reserve margin might be negatively impacted. FPL did not discuss this issue with TECO, but unilaterally made the decision not to move forward with negotiations with TECO, without raising the concern with TECO

**ISSUE 12:** Was Florida Power & Light Company's decision to apply an equity penalty cost to projects filed in response to its Supplemental Request for Proposals appropriate? If so, was the amount properly calculated?

**CPV**

**Gulfoast:** No. The equity penalty is just that, a penalty against outside proposals. Constructing and operating a power plant imposes many risks that can be shifted to an Independent Power Producer and away from the utility's ratepayers through a power purchase contract.

**ISSUE 13:** In its evaluation of Martin Unit 8, Manatee Unit 3, and projects filed in response to its Supplemental Request for Proposals, issued on April 26, 2002, did Florida Power & Light Company properly and accurately evaluate transmission interconnection and integration costs?

**CPV**

**Gulfoast:** FPL did not break out the transmission and integration cost for each proposed facility. Thus, the actual costs for transmission and integration for each unit which is the subject of these proceedings cannot be ascertained with certainty, and, consequently, these costs were not properly and accurately evaluated.

**ISSUE 14:** Is Florida Power & Light Company's Martin Unit 8 the most cost-effective alternative available?

**CPV**

**Gulfcoast:** It cannot be determined that the Martin Unit 8 is the most cost effective alternative available, as the RFP was not conducted in a fair and impartial manner and FPL's self-build cost estimates are not based on firm numbers but are aggressive estimates.

**ISSUE 15:** Is Florida Power & Light Company's Manatee Unit 3 the most cost-effective alternative available?

**CPV**

**Gulfcoast:** No.

**ISSUE 16:** Based on the resolution of the foregoing issues, should the Commission grant Florida Power & Light Company's petition for determination of need for Martin Unit 8?

**CPV**

**Gulfcoast:** No. The Commission should deny the Petition and move to require a fair and unbiased selection process that will provide outcomes in which the Commission and the utility's rate payers can have confidence. FPL to re-bid the capacity represented by the Manatee Unit 3.

**ISSUE 17:** Based on the resolution of the foregoing issues, should the Commission grant Florida Power & Light Company's petition for determination of need for Manatee Unit 3?

**CPV**

**Gulfcoast:** No. The Commission should deny the Petition and move to require a fair and unbiased selection process that will provide outcomes in which the Commission and the utility's rate payers can have confidence. FPL to re-bid the capacity represented by the Manatee Unit 3.

### **III. PROPOSED FINDINGS OF FACT**

1. FPL has a history of opposing the entry of competitors into the Florida wholesale market. (Prefiled Testimony of Sean Finnerty (hereafter Finnerty Testimony, p. 3).
2. FPL's Power Generation Division had in place, prior to the issuance of either

RFP, a business plan that set forth the following: “Pursue breakthrough opportunities to compete with purchase power and displace competition to increase the amount of native base load supplied by PGBU” (Power Generation Business Unit).

3. This plan also states that the sale of energy purchased from NUGs, which includes Independent Power Producers, results in a lost opportunity for FPL to earn a return on investment.

4. FPL’s only internal document which described how the outside bids would be evaluated described a process in which FPL’s self-build options would continue to be refined until the self-build options were lower in cost than the competing outside bids. (Finnerty Testimony, Exhibit 5).

5. According to this document, only after FPL won the comparison with outside bids, would the results be considered by FPL senior management. (Finnerty Testimony, Exhibit 5).

6. FPL, in evaluating its own self-build options and the outside bids, used criteria that were not disclosed to the bidders in the supplemental RFP.

7. Paul Evanson, in presenting information to the Board of FPL Group about the RFP, indicated that FPL’s self-build options resulted in six turbines being used from the GE contractual commitment. As this was included in material presented to the Board, it was a significant consideration. This factor was not disclosed to the bidders in the Supplemental RFP.

8. FPL did not disclose in the Supplemental RFP the equity penalty formula that would be used in evaluating certain outside bids.

9. FPL did not inform bidders in its Supplemental RFP that bids would be grouped together

and evaluated as grouped bids.

10. FPL did combine the bids and evaluated them as grouped proposals.

11. The evaluation process resulted in bids within a particular group being dependent on other bids within the same group.

12. FPL referred to the equity penalty as “not the cake, but it may not even be the icing. It’s more like the candle.” This reference was made in an internal FPL e-mail authored by the FPL person charged with evaluating the economic aspects of the outside bids. See Exhibit 3 to Egan’s testimony.

13. FPL’s cost figures used in its need case were based on estimates. FPL’s own witness conceded that contracts provide more certainty with respect to cost projections than do estimates.

14. One bidder had proposed a project which had lower revenue requirements than the FPL self-build proposals. FPL entered into a settlement agreement with this bidder, removing the proposal from further consideration by the Commission.

15. FPL’s initial RFP contained a “legislative out” provision that was unfair to the bidders. (Finnerty Testimony, p. 6)

16. FPL’s Supplemental RFP contained a “regulatory out” provision that this Commission had previously rejected in Standard Offer contracts.

17. Asking bidders to accept a “regulatory out” provision which this Commission had previously rejected was not fair to the bidders.

18. FPL prepared a short list of five bidders. FPL did not meet to negotiate with four of these five bidders.

#### **IV. PROPOSED CONCLUSIONS OF LAW**

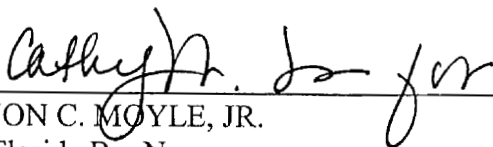
1. In this case, as the Petitioner for a determination of need, FPL did not meet its burden of proof by demonstrating by a preponderance of competent substantial evidence that it is entitled to a positive determination from this Commission. See Florida Dept. of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1<sup>st</sup> DCA 1981).

2. FPL did not demonstrate by a preponderance of competent substantial evidence in the record of this proceeding that it is the most cost-effective alternative for the proposed electric generation capacity within the meaning of Section 403.519, F.S., and Rule 25-22.082, F.A.C.

3. FPL did not comply with the Bid Rule, Rule 25-22.082, F.A.C., in that it failed to describe the methodology and other price and non-price attributes that would be used to evaluate bids, and also failed to disclose the criteria by which the bids would be judged.

4. Based on the foregoing, FPL has not demonstrated its entitlement to a determination by this Commission that its proposed self-build option is the most cost-effective alternative, as required by Section 403.519, F.S., thereby qualifying FPL to go forward with developing the additional capacity it seeks to develop at Manatee Unit 3 and Martin Unit 8. Accordingly, its Petitions for Determination of Need for the Manatee and Martin Units should be denied.

Respectfully submitted this 14th day of October, 2002.

  
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JON C. MOYLE, JR.  
Florida Bar No.  
CATHY M. SELLERS  
Florida Bar No.  
Moyle, Flanigan, Katz, Raymond & Sheehan, PA.

The Perkins House  
118 North Gadsden Street  
Tallahassee, Florida 32301  
Telephone: (850) 681-3828  
Facsimile: (850) 681-8788

**Attorneys for CPV Gulfcoast, Ltd.**



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail to those listed below without an asterisk, and by e-mail and hand delivery to those listed below with an asterisk on this 14<sup>th</sup> day of October, 2002:

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

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

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

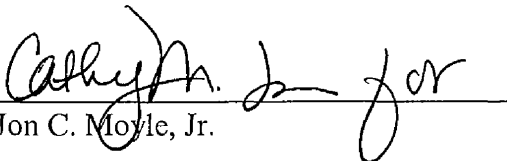
Michael B. Twomey, Esquire  
Post Office Box 5256  
Tallahassee, Florida 32314-5256

\*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

By:   
Jon C. Moyle, Jr.

David Bruce May, Esquire