

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination )  
of Need of Hines Unit 3 Power )  
Plant )  
\_\_\_\_\_)

Docket No.: 020953-EI

Submitted for filing: November 7, 2002

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**FLORIDA POWER CORPORATION'S MEMORANDUM  
IN OPPOSITION TO PACE'S PETITION TO INTERVENE**

**INTRODUCTION**

Florida Power Corporation ("Florida Power" or "the Company") commenced this proceeding on September 4, 2002, to obtain a determination of need for Florida Power's proposed Hines Unit 3. Two months after the commencement of this proceeding, the Florida Partnership for Affordable Competitive Energy ("PACE") filed its Petition to Intervene in these proceedings for the purpose of raising general issues about the "fairness" of the bid process. PACE's request to intervene does not meet the standards for associational standing and should be denied.

Moreover, the Commission recently scheduled rulemaking hearings the same week as the final hearing in this case for the exact purpose of taking testimony and comments on the fairness of the existing bid process. Accordingly, PACE should be directed to provide its testimony and comments on the fairness of the existing bid process in that forum.

**ARGUMENT**

**I. PACE Does Not Have Standing to Intervene**

**A. PACE Cannot Establish Associational Standing**

The Florida Supreme Court established the ground-rules for associational standing in Florida Home Builders Ass'n v. Department of Labor and Employment Sec., 412 So. 2d 351 (Fla. 1982). There, the Court held that an association must demonstrate that (1) a substantial

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number of its members, although not necessarily a majority, are ‘substantially affected’ by the proposed agency action (in that case, a rule), (2) the subject matter of the proceeding is within the association's general scope of interest and activity, and (3) the relief requested is of the type appropriate for the association to receive on behalf of its members. Id. at 353-54.

Whether an association is able to meet this test depends, in turn, on whether the association’s members may establish standing under the two-prong test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), and later adopted by the Supreme Court in Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997):

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Agrico, 406 So. 2d at 482. These principles are incorporated in Rule 25-22.039 of the Florida Administrative Code, which provides that intervenors must:

[D]emonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

PACE has not demonstrated in its Petition that it can meet these requirements. To the contrary, it is clear on the face of the Petition that PACE cannot meet these requirements.

PACE asserts that it wishes to intervene in this case based on two interests: (1) First, PACE points out that several of its members were disappointed bidders who had submitted unsuccessful responses to Florida Power’s Request for Proposals (“RFP”). Petition, ¶ 7. (2) Second, PACE asserts that it seeks to participate in this proceeding in support of its mission of ensuring that “the most cost-effective alternative for the proposed electric generating capacity is

selected” in the spirit of “benefit[ing] all Floridians.” Petition, ¶¶ 4, 8. PACE is not entitled to intervene in this case on either ground.

**1. PACE Does Not and Cannot Actually Advance the Interests of any Disappointed Bidder**

Although PACE pays lip service to the fact that some of its members submitted unsuccessful bids in response to Florida Power’s RFP, PACE most definitely does not seek to appear in this case in support of any one or more of those bids. In fact, PACE admits in its Petition that its participation in this proceeding will not “involve advocacy in support of a particular alternative” to Hines 3. Petition, ¶ 8. Unlike associations that may seek to participate in other proceedings, PACE stands in the unique position of purporting to represent members who submitted competing bids in Florida Power’s RFP process. In these circumstances, PACE may not be viewed simply as the sum of its parts, equally well situated as its members to represent their individual interests as disappointed bidders. Thus, PACE disavows any intention to argue in favor of any particular bid.

Why is this important? This is critically important because a disappointed bidder is given standing to participate in a bid protest for the very purpose of advocating a particular proposal that the bidder can credibly allege should have been accepted instead of the bid actually chosen. Otherwise, the would-be intervenor could not demonstrate that it has a concrete interest in the outcome of the proceeding. As the Court held in Agrico, in order to demonstrate a substantial interest in the outcome of a proceeding, the prospective intervenor must establish that it “will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing.” Agrico, 406 So. 2d at 482 (all emphasis added unless noted).

In this case, however, none of PACE’s members who actually submitted a bid seeks to intervene in support of its own proposal. Further, PACE declines to do as a trade association

what none of its members is willing to do individually—that is, contend that any particular project is superior to the project for which Florida Power is seeking an affirmative determination of need. PACE cannot assert associational standing based on interests that no one is asserting—namely, the interests of disappointed bidders in demonstrating that their projects should have been selected by Florida Power in lieu of the Company’s self-build alternative.

The courts have repeatedly recognized that, to gain intervention in a bid protest, a bidder must be prepared to demonstrate that its particular project would have been selected but for the option actually chosen. Only then will the bidder’s interest be sufficiently immediate to meet the prerequisites for standing. For this reason, courts have held that only the second-lowest bidder to a public contract has standing to challenge a state agency’s acceptance of another bid. See Preston Carroll Co. v. Florida Keys Aqueduct Authority, 400 So. 2d 524, 524 (Fla. 3d DCA 1981). In Preston Carroll Co., the Third District stated, “In order to contest the award of a public contract to an apparent low bidder, appellant was required to establish that it had a ‘substantial interest’ to be determined by the agency. A second lowest bid establishes that substantial interest.” Id. at 524. The reasoning behind this rule is clear. In most cases, the company with the second-lowest bid is the only company that would have been granted the contract if the accepted bid had been rejected. Thus, that company is the only one that is immediately injured by the agency’s decision.

As already discussed, the Agrico decision establishes that standing requires a showing of “immediate” injury in fact. The “immediacy” requirement is intended to preclude participation based on stated concerns that are speculative or remote. See Village Park Mobile Home Ass’n, Inc. v. State, Dep’t of Bus. Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987) (stating, “[A]bstract injury is not enough. The injury or threat of injury must be both real and immediate,

not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct.”).

In this case, PACE does not and cannot allege that Florida Power would have and should have selected any one of its members’ bids in lieu of Florida Power’s self-build option. Accordingly, PACE cannot assert standing based on the interests of any one of its members, let alone all of these competing bidders, and PACE’s Petition to Intervene should be denied.

This result is compelled by the Commission’s own rules and decisions. Rule 25-22.090(8) of the Florida Administrative Code provides: “The Commission shall not allow potential suppliers of capacity who were not participants to contest the outcome of the selection process in a power plant need determination proceeding.” The Commission has explained that the intent of this rule is to preclude intervention by prospective power suppliers who have some agenda other than advocating particular proposals actually presented and considered during the utility’s RFP process. See In re: Petition by Florida Power Corporation for Waiver of Rule 25-22.082, FAC, selection of generating capacity, 1999 Fla. PUC LEXIS 227, 99 FPSC 2:92 (Feb. 9, 1999) (“FPC Bid Rule Waiver Decision”) (the Bid Rule was intended “to preclude likely intervenors” who do not actually submit proposals during the RFP process).

Here, as we have explained, PACE has admitted in its Petition that it does not intend to intervene in support of any actual proposal considered and rejected by Florida Power. Rather, PACE intends to argue generic issues apparently aimed at inducing changes in the Bid Rule itself. The Bid Rule was enacted in significant part, however, to prevent intervention by those who do not intend to demonstrate they submitted a particular project during the RFP project that should have been but was not selected by the utility.

Based on PACE’s own admissions, PACE stands before the Commission as a non-bidder, who wishes to raise issues of general concern. PACE makes a point of saying in its Petition that

“[a]s a trade association, PACE does not submit bids or develop projects.” Petition, ¶ 8. But non-bidders do not have standing to challenge the results of a bid proceeding. Brasfield & Gorrie General Contractor, Inc. v. AJAX Construction Co. of Tallahassee, 627 So. 2d 1200, 1203 (Fla. 1st DCA 1994) (“a non-bidder, who is not and cannot potentially be a party to the contract with the public body, is not entitled to the relief of either an award of the contract, or a re-bid”); Fort Howard Co. v. Dep’t. of Management Services, 624 So. 2d 783 (Fla. 1st DCA 1993) (holding that non-bidder supplier did not have standing to challenge bid results even though it was the supplier for the two vendors submitting the lowest bids).

In Westinghouse Electric Corp. v. Jacksonville Transportation Authority, 491 So.2d 1238 (Fla. 1st DCA 1986), the First District held that, absent extraordinary circumstances, a non-bidder does not have standing to file a bid protest. The court reasoned that non-bidders should not be allowed to learn the terms of other bids and then challenge the process in an attempt to force a re-bidding. Id. at 1241. Such “sandbagging” would erode the integrity of the public bidding process. Id. The exclusion of non-bidders also protects against the intervention of limitless parties in bid determinations. See Fort Howard Co., 624 So. 2d at 785 (holding that allowing a non-bidder to challenge the bid process would open the floodgate of potential protestants to bid awards). Accordingly, PACE’s petition should be denied.

**2. PACE Does Not Have Standing to Assert the General Economic Interests of Its Members**

PACE asserts that it should be given standing for the general purpose of “ensuring that the most cost-effective alternative for the proposed electric generating capacity is selected.” Petition, ¶ 8. PACE does not seek standing as a customer. Rather, PACE insists that it should be given leave to develop this issue because PACE is “a statewide trade association of independent power producers, working together to promote a competitive wholesale electricity marketplace in

Florida that will benefit all Floridians.” Petition, ¶ 4. PACE’s alternative position is fatally flawed.

As a threshold matter, PACE’s Articles of Incorporation (attached hereto) make clear that PACE is organized to protect the economic interests of independent power producers, not ratepayers. Specifically, PACE’s Articles of Incorporation state that PACE was organized and exists “exclusively for the purpose of serving . . . the common business and professional interests of, and to improve the common business and professional conditions of independent power producers.” Article IV. Neither Section 403.519 nor the Florida Electric Power Plant Siting Act includes within the zone of interests they protect the protection of the economic interests of independent power producers. Tampa Electric Co. v. Garcia, 767 So. 2d 428, 435-36 (Fla. 2000). See also City of Sunrise v. South Florida Water Management District, 615 So. 2d 746 (Fla. 4<sup>th</sup> DCA 1993) (denying intervention to municipal water company seeking to challenge consumptive use permit granted to competing water company, holding that “[w]hile Sunrise may suffer losses and its customers incur expenses due to economic competition and under utilized capacity, this does not satisfy the ‘immediacy’ requirement,” and “[c]ompetitive economic considerations do not fall within the zone of protection” of the permitting process).

In fact, PACE admits in its Petition that this need proceeding is intended “to ensure the most cost-effective capacity additions, evaluated from the perspective of FPC’s ratepayers, is selected.” Petition, ¶ 7. By PACE’s own admission, then, this need proceeding is not intended to protect the economic interests of prospective bidders, individually or collectively.

It is well-settled that a would-be intervenor must establish that the substantial interest it seeks to protect falls within the zone of interests that the proceeding is designed to protect. E.g., Agrico, 406 So. 2d at 482 (intervenor must assert a “substantial injury . . . of a type or nature which the proceeding is designed to protect”); City of Sunrise. Here, PACE cannot meet this

fundamental requirement. PACE should not be given standing to advance its members' competitive interests in the name of protecting the interests of the ratepayers.

Further, even taking at face value PACE's statement that PACE seeks to intervene to "ensur[e] that the most cost-effective alternative for the proposed electric generating capacity is selected," this is the Commission's job, not PACE's job. There is no principle of administrative law that permits parties to intervene to play watchdog over the agency charged with the responsibility to make the decision in question.

Finally, if PACE were permitted to intervene ostensibly to argue the best interests of Florida Power's customers (viewed, of course, from PACE's perspective) then anybody should be given leave to intervene, as long as they are able to state solemnly that they are committed to ensuring that the ratepayers get a fair shake in this State. The Florida Supreme Court rejected an analogous argument, however, in Ameristeel, holding that the petitioner's alleged general interest in that case in avoiding higher utility rates was "not an injury in fact of sufficient immediacy to entitle [the petitioner] to a section 120.57 hearing." 691 So. 2d at 477. To accept PACE's argument would be to eliminate any meaningful test for standing.

**B. The Bid Rule Hearing Will Provide PACE With a More Appropriate Forum**

Further, a need determination proceeding is not a rulemaking or investigative proceeding conducted to determine policy. The proceeding is focused on whether a specific power plant is needed and whether the particular alternative selected by the utility-provider is the most cost-effective means of meeting the utility's identified need.

PACE's petition reflects that PACE intends to challenge the "appropriateness of scoring criteria" and the "fairness of process." These are policy concerns that should be addressed in a rulemaking proceeding. In fact, PACE has proposed changes to the solicitation requirements of Rule 25-22.082, and is an active participant in proceedings to consider such changes. See



Docket No. 020398-EQ (“Bid Rule Docket”). The Commission has now scheduled hearings in the Bid Rule Docket for the same week as the Hines 3 hearing. PACE will have every opportunity to present its views on the policy issues it has identified in that docket.

A need determination proceeding is not the forum for PACE to argue its rule and policy concerns. See AmeriSteel (requiring demonstration of immediate injury). Proceedings pursuant to section 403.519 have a limited purpose very different from general rulemaking. PACE’s Petition should be denied for this reason, too.

## **II. This Case Should Not be Governed by the Florida Power & Light Ruling**

Finally, PACE relies in its Petition on the Commission’s decision granting PACE standing to intervene in the FP&L proceeding concerning the Manatee Unit 3 and Martin Unit 8 proposed electric generating facilities. That decision should not be controlling here for at least four principal reasons.

First, at the time of the FP&L proceeding, the Commission had not yet decided to conduct rulemaking hearings in the Bid Rule Docket. As a result, the Commission was gathering information about the RFP process through, inter alia, intervention in need proceedings. Since that time, the Commission has decided to conduct hearings in the Bid Rule Docket and has scheduled such hearings for the same week as the Hines 3 hearing. Accordingly, PACE now has a superior forum to present, and the Commission has the opportunity to receive, testimony and comments on the general issues that PACE intends to raise in this proceeding. The issues that PACE seeks to raise in this case, while styled as disputed issues of fact, are really generic issues more appropriately considered in rulemaking. For reasons of administrative efficiency, if nothing else, PACE’s issues should be considered in the most appropriate forum, which is the Bid Rule hearings.

Second, PACE's participation in the FP&L proceeding was simply cumulative of participation by at least one actual bidder.

Third, the Commission did not take into account or consider in the FP&L case whether PACE was able to demonstrate on behalf of any of its members that any given member's particular proposal would have and should have been accepted by the utility in lieu of self-build options. Here, PACE alone seeks intervention, and PACE cannot and will not argue in support of any concrete proposal submitted and considered in Florida Power's RFP process.

Fourth, the Commission did not have before it or take into account PACE's Articles of Incorporation, which conclusively demonstrate that PACE's true interests do not fall within the zone of interests protected by this proceeding.

### **Conclusion**

For the foregoing reasons, Florida Power respectfully requests that the Commission deny PACE's Petition to Intervene.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been served by U.S. Mail to the interested parties of record as listed below on this 7th day of November, 2002.



\_\_\_\_\_  
Attorney

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ARTICLES OF AMENDMENT  
to  
ARTICLES OF INCORPORATION  
of

FILED

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SECRETARY OF STATE  
TALLAHASSEE, FLORIDA

Florida Independent Power Producers Association, Inc.  
(present name)

N01000007362  
(Document Number of Corporation (if known))

*Pursuant to the provisions of section 617.1006, Florida Statutes, the undersigned Florida nonprofit corporation adopts the following articles of amendment to its articles of incorporation.*

FIRST: Amendment(s) adopted: (INDICATE ARTICLE NUMBER (S) BEING AMENDED, ADDED OR DELETED.)

Amend the name in ARTICLE I. to read:

Florida Partnership for Affordable Competitive Energy, Inc.

SECOND: The date of adoption of the amendment(s) was: October 24, 2001

THIRD: Adoption of Amendment (CHECK ONE)

- The amendment(s) was(were) adopted by the members and the number of votes cast for the amendment was sufficient for approval.
- There are no members or members entitled to vote on the amendment. The amendment(s) was(were) adopted by the board of directors.

  
\_\_\_\_\_  
Signature of Chairman, Vice Chairman, President or other officer

Michael C. Green

\_\_\_\_\_  
Typed or printed name

President  
\_\_\_\_\_  
Title

October 24, 2001  
\_\_\_\_\_  
Date

ARTICLES OF INCORPORATION  
OF  
FLORIDA INDEPENDENT POWER PRODUCERS ASSOCIATION, INC.

The undersigned, acting as incorporator of Florida Independent Power Producers Association, Inc., under the Florida Not For Profit Corporation Act, adopts the following Articles of Incorporation:

ARTICLE I. NAME

The name of the corporation is: Florida Independent Power Producers Association, Inc.

ARTICLE II. ADDRESS

The street address of the initial principal office and the mailing address of the corporation are:

324 East Virginia Street  
Tallahassee, Florida 32301

ARTICLE III. DURATION AND COMMENCEMENT

The corporation will exist perpetually, commencing on the date of filing these Articles of Incorporation.

ARTICLE IV. PURPOSE

The corporation is organized as a corporation not for profit, exclusively for the purpose of serving as a not for profit trade association or business league, to serve the common business and professional interests of, and to improve the business and professional conditions of independent power producers, including but not limited to Calpine Corporation; Competitive Power Ventures, Inc.; Constellation Power, Inc.; Duke Energy North America, LLC.; PG&E National Energy Group; and Reliant Resources, Inc. In furtherance of these purposes, the corporation may make or accept grants, carry on programs and activities, and sponsor projects in order to promote and support the business and professional reputation and development of independent power producers, and in order to promote, support and enhance the professional skills and proficiency of, and the business and professional opportunities available to, such independent power producers. Further, the corporation may engage in other activities designed or intended to accomplish such purposes. To these ends, the corporation may do and engage in any and all lawful activities that may be incidental or reasonably necessary to any of these purposes, and it shall have and may exercise all other powers and authority now or hereafter conferred upon corporations not for profit in the State of Florida.

ARTICLE V. LIMITATIONS ON CORPORATE POWER

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SECRETARY OF STATE  
TALLAHASSEE, FLORIDA

APPROVED  
AND  
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The corporate powers of the corporation are as provided in Section 617.0302, Florida Statutes, except to the extent such powers are limited by the following provisions of this Article:

The corporation shall not have or issue shares of stock. No dividends shall be paid, and no part of the income of the corporation shall be distributed to its members, directors or officers. The corporation may pay compensation in a reasonable amount to its members, directors and officers for services rendered, may confer benefits upon its members in conformity with its purposes, and upon dissolution, partial liquidation, or final liquidation may make distributions to its members as hereinafter provided.

ARTICLE VI. INITIAL REGISTERED OFFICE AND AGENT

The corporation designates 324 East Virginia Street, Tallahassee, Florida 32301, as the street address of the initial registered office of the corporation and names Sally Adams the corporation's initial registered agent at that address to accept service of process within this state.

ARTICLE VII. MEMBERS

The corporation shall have one or more classes of members as provided in the bylaws of the corporation. The number of classes, the qualifications and rights of each class of members, and the manner of their admission shall be as provided in the bylaws.

ARTICLE VIII. INITIAL BOARD OF DIRECTORS

The corporation shall be governed by a board of directors. The board of directors has six (6) members initially. The number of directors may be either increased or diminished from time to time, as provided in the bylaws, but will never be less than six (6). The method of election or appointment of the directors shall be as provided in the bylaws. The names of the initial directors are:

- Michael C. Green
- Timothy R. Eves
- Frank Stallwood
- Sean J. Finnerty
- Richard L. Wolfinger
- John R. Orr, Jr.

ARTICLE IX. INCORPORATOR

The name and street address of the incorporator are:

<u>Name</u>	<u>Address</u>
Frank Stallwood	One Independent Drive, Suite 3232, Jacksonville, FL 32202

## ARTICLE X. BYLAWS

The power to adopt, alter, amend or repeal corporate bylaws shall be vested in the board of directors.

## ARTICLE XI. AMENDMENTS

Amendments to these Articles may be made by resolution passed by two-thirds of the board of directors.

## ARTICLE XII. DISSOLUTION

In the event of any liquidation, partial liquidation, dissolution or winding up of the corporation, whether voluntary or involuntary, and whether total or partial, each member shall be entitled to receive cash or assets equivalent to the capital contribution paid to the corporation by such member. If the assets available for distribution upon any liquidation, partial liquidation, dissolution or winding up of the corporation are not sufficient to permit the refund of all such capital contributions, all the assets of the corporation shall be distributed ratably in proportion to the amount of capital paid to the corporation by the various members, but without interest. If any assets of the corporation remain after the refund or distribution to the members of all their capital contributions, such remaining assets shall be distributed to such organization or organizations exempt from tax under the provisions of Section 501 (c)(3) of the Internal Revenue Code as the board of directors of the corporation shall determine.

## ARTICLE XIII. INDEMNIFICATION

(a) The corporation shall indemnify any person who is or was a party to any proceeding by reason of the fact that such person is or was a director or officer of the corporation or of any corporation not for profit of which the corporation is a member, to the fullest extent not prohibited by law, for actions taken in the capacity of such person as a director or officer of the corporation or of any corporation not for profit of which the corporation is a member. To the fullest extent not prohibited by law, the corporation shall advance indemnification expenses for actions taken in the capacity of such person as an officer or director, within twenty (20) days after receipt by the corporation of (1) a written statement requesting such advance, (2) evidence of the expenses incurred, and (3) a written statement by or on behalf of such person agreeing to repay the advanced expenses if it is ultimately determined that such person is not entitled to be indemnified against such expenses.

(b) The corporation by action of its board of directors, in its sole discretion, may indemnify any person who is or was a party to any proceeding, by reason of the fact that such person is or was an employee or agent of the corporation or of any corporation not for profit of which the corporation is a member, to the fullest extent not prohibited by law, for actions taken in the capacity of such person as an employee or agent of the corporation or of any corporation not for profit of which the corporation is a member. The corporation by action of its board of directors, in its sole discretion, may advance indemnification expenses for actions taken in the capacity of such person as an employee or agent, after receipt by the corporation of (1) a written statement requesting such advance, (2) evidence of the expenses incurred, and (3) a written statement by or on behalf of such person agreeing to repay the advanced expenses if it is



ultimately determined that such person is not entitled to be indemnified against such expenses. Absent specific action by the board of directors, the authority granted to the board of directors in this paragraph (b) shall create no rights in the persons eligible for indemnification or advancement of expenses and shall create no obligations of the corporation relating thereto.

The undersigned incorporator, for the purpose of forming a corporation not for profit under the laws of the State of Florida, has executed these Articles of Incorporation on September 26, 2001.

  
\_\_\_\_\_  
Frank Stallwood, Incorporator

The undersigned agrees to act as registered agent for the corporation named above, to accept service of process at the place designated in these Articles of Incorporation, and to comply with the provisions of the Florida Not For Profit Corporation Act, and acknowledges that it is familiar with, and accepts, the obligations of such position.

Dated: October 16, 2001 ...

  
\_\_\_\_\_  
Sally Adams, Registered Agent

SECRETARY OF STATE  
TALLAHASSEE, FLORIDA

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APPROVED  
AND  
FILED