

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

ORDER NO. PSC-02-0703-PCO-EI

ISSUED: May 23, 2002

ORDER GRANTING PETITION FOR EMERGENCY WAIVER
OF RULE 25-22.080(2), FLORIDA ADMINISTRATIVE CODE

INTRODUCTION

In August of 2001, Florida Power & 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 Florida Department of Environmental Protection in February of 2002, and filed its Petitions for Need Determinations on March 22, 2002.

Several companies who responded to FPL's RFP have intervened in the need determination dockets.¹ They have all criticized FPL's RFP process. One, Reliant Energy Power Generation (Reliant), has filed a separate complaint in which it contends that FPL's RFP process failed to comply with Rule 25-22.082, Florida Administrative Code.

¹ Those companies include Reliant Energy Power Generation, Inc., Calpine Energy Services, L.P., CPV Cana, Ltd., Mirant Corporation, and South Pond Energy Park, LLC.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

On April 22, 2002, in response to the intervenors' complaints about the initial RFP, FPL filed an emergency motion to hold the need determination cases in abeyance, so that it could have additional time to issue a supplemental RFP that would address the intervenors' complaints. On April 26, 2002, the Prehearing Officer granted FPL's motion in his Interim Order On Procedure, Order No. PSC-02-0571-PCO-EI. In that Order, the Prehearing Officer anticipated that the need determination hearing would be held in October, and noted that FPL would be filing an Emergency Petition for Waiver of Rule 25-22.080(2), Florida Administrative Code, which sets a 90-day time limitation for a need determination hearing.²

FPL filed its emergency petition on April 29, 2002. An FAW notice announcing receipt of FPL's rule waiver petition was published on Friday, May 10, 2002. CPV Cana, Ltd. (CPV Cana) filed comments on FPL's emergency waiver petition on May 3, 2002, and Reliant filed comments on May 20, 2002. For the reasons explained below we grant FPL's emergency petition for waiver of Rule 25-22.080(2), Florida Administrative Code. The petition satisfies the criteria for an emergency rule waiver.

FPL's PETITION FOR WAIVER

Rule 25-22.080(2), Florida Administrative Code, provides that an administrative hearing on a petition for a determination of need for an electric power plant must be held within 90 days of the filing of the petition. A decision on the petition must be made within 135 days of the filing of the petition. In its petition for waiver, FPL explains that its decision to issue a supplemental RFP necessitates an adjustment to the procedural schedule in these need determination proceedings. The hearing for the dockets was scheduled to be held June 19-21, 2002, within 90 days of the date FPL filed the need determination petitions. FPL cannot conduct a new RFP, evaluate the proposals it receives, negotiate with

² On April 24, 2002, CPV Cana filed a Response to the Motion for Abeyance, which also contained a rule waiver petition, for the same rule. CPV Cana's petition was also noticed in the May 10, 2002, FAW. CPV Cana's petition will be addressed at a later date, because it was not filed as an emergency petition and the time for comments has not expired.

prospective bidders, and file supplemental testimony and exhibits -- which the parties would need time to explore and address -- within the original time schedule of the case. Therefore, FPL requests an emergency waiver of the rule's hearing time limitations, so that the supplemental RFP may be conducted and the final hearing rescheduled to October 2-4, 2002.

FPL claims that its requested waiver and stay of the proceedings meets the criteria for a waiver found in section 120.542, Florida Statutes. That statute provides that the petitioner must show a substantial hardship or a violation of principles of fairness if the petitioner is required to comply with the rule in question, and the petitioner must also show that the purposes of the underlying statute will still be achieved. FPL states that its requested waiver will not undermine the purposes of the need determination statute, section 403.519, Florida Statutes. Section 403.519 provides that the Commission shall determine the need for a proposed electrical power plant based upon the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. FPL asserts that the proposed waiver will actually serve to better effectuate the purposes of the statute by affording prospective providers of generating alternatives with an additional opportunity to propose cost-effective alternatives to FPL's Martin and Manatee capacity additions. FPL states that substantial hardship will occur if the 90-day time frame is not waived, because FPL will not be able to conduct its supplemental RFP to determine if a more cost-effective alternative exists to its proposed plants. The Commission will have less certainty that it is determining the need for additional capacity that is the most cost-effective alternative for FPL's ratepayers.

FPL asserts that this rule waiver must be granted on an emergency basis pursuant to Rule 28-104.004, Florida Administrative Code, because the June 19-20 hearing is fast approaching, and the usual 90-day processing time for a rule waiver is too slow to accommodate the supplemental RFP process. FPL states:

Given the need to proceed expeditiously with the supplemental RFP and to alleviate the parties from the requirements of continuing on-going litigation that may

ultimately be rendered moot, the requested rule waiver should be entered as soon as possible. Any substantial delay will create undue hardship for all parties.

FPL states that it conferred with counsel for the intervenors in these cases, and they have not objected to the waiver in light of the fact that FPL will file its supplemental testimony and exhibits on the results of the supplemental RFP by July 16 and the hearing will be scheduled for October 2-4. The intervenors themselves have also indicated in their written responses and in their comments at our Agenda Conference that they do not object to a waiver under these circumstances.

DECISION

Section 120.542(2), Florida Statutes, sets forth the criteria that must be satisfied by a petitioner seeking a variance or waiver from agency rules:

Variations and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statutes will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

An emergency petition must also meet the requirements of Rule 28-104.002, and Rule 28-104.004(2), Florida Administrative Code, which provide that a petition for an emergency waiver must also specify:

- (a) The specific facts that make the situation an emergency; and
- (b) The specific facts to show that the petitioner will suffer an immediate adverse affect unless the variance or

waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S.

FPL has demonstrated that both FPL and the intervenors to the case will face substantial hardship if the rule waiver is not granted. Failure to grant the rule waiver will force the parties to continue expensive, complicated litigation over issues that a second RFP could potentially resolve. The supplemental RFP process may resolve or clarify several issues raised by the parties, and, in any event, the supplemental RFP will likely lead to a more effective and clear need determination proceeding. Moreover, granting the request for waiver supports principles of fairness, in that it allows the supplemental RFP process to take place, giving all parties additional opportunity to submit new or additional proposals which may be cost-effective alternatives to FPL's self-build option.

The underlying purpose of Section 403.519, Florida Statutes, is to ensure the integrity and reliability of Florida's electrical power system in the most cost-effective manner. Granting the rule waiver in order to allow a second RFP process does indeed serve the purposes of Section 403.519, Florida Statutes. The additional RFP process will assist the Commission in its analysis of the cost-effectiveness of the project or projects that will ultimately be the subject of these need determination proceedings. The additional time will also allow the parties the opportunity to resolve some or all of the outstanding issues in the need determination proceedings, which may simplify the final hearing. The rule waiver under these circumstances will promote the purposes of the underlying statute.

Pursuant to the requirements of Section 403.519, Florida Statutes, and Rule 25-22.080, Florida Administrative Code, a hearing on the need determination petitions was set for June 19-21, 2002. The non-emergency rule waiver process of section 120.542, Florida Statutes, would take a decision on FPL's rule waiver request more than a month past the current need determination hearing schedule, in violation of our rule. For this reason, FPL's petition meets the requirements of Rule 28-104.002, Florida Administrative Code.

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For the reasons explained above, we find that FPL has demonstrated that the purposes of the underlying statute will be achieved by granting the rule waiver requested, and that failure to grant the waiver requested would work substantial hardship on the parties or violate principles of fairness. In addition, FPL has demonstrated specific facts that make this situation an emergency, and which show that FPL and the other parties will suffer an immediate adverse effect unless the waiver is granted.

It is therefore,

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's Emergency Petition for Waiver of Rule 25-22.080(2), Florida Administrative Code, is granted. It is further,

ORDERED that these Dockets shall remain open to complete the need determination proceedings.

By ORDER of the Florida Public Service Commission this 23rd day of May, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.