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March 15, 2002

**VIA HAND DELIVERY**

Blanca S. Bayo, Director
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Re: Post-Workshop Memorandum of Florida PACE

Dear Ms. Bayo:

On behalf of Florida PACE, I am enclosing for filing and distribution the original and 15 copies of the following:

- Post-Workshop Memorandum of Florida PACE

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Joe A. McGlothlin

Joseph A. McGlothlin

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**In re: Rule Development Workshop to Consider Amendments to Rule 25-22.082.F.A.C.**

**Filed: March 15, 2002**

## POST-WORKSHOP MEMORANDUM OF FLORIDA PACE

As directed by the Chairman at the conclusion of the February 7, 2002 workshop, Florida PACE submits its Memorandum addressing the subjects that were identified for further comments.

## INTRODUCTION

In January 2002, the Commission Staff distributed a "Strawman" proposal which, if adopted, would amend Rule 25-22.082, Florida Administrative Code. The "Strawman" would expand the scope of the current rule to include capacity additions of 50 MW or more, thereby encompassing combustion turbines and repowering projects that investor-owned utilities can now pursue without first seeking and considering competitive alternatives. The "Strawman" would enlarge the list of information that the IOU would be required to provide in its Request For Proposals (RFP). It would require IOUs to allow respondents to develop capacity additions on sites owned by the IOUs. The "Strawman" would enable the Commission to deny the capacity addition that is the subject of an IOU's petition in a determination of need case and directly select the most cost effective alternative from the options before it.

The Commission held a rule development workshop on February 7, 2002. During the workshop, Florida PACE distributed a separate proposal to amend Rule 25-22.082, F.A.C. The PACE proposal incorporates the broader scope of the "Strawman." To the basic structure of the "Strawman", PACE added amendments to require IOUs to submit their RFPs to the Commission for approval prior to issuance; to engage a neutral party (the "independent evaluator") to evaluate

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and score proposals in accordance with criteria approved by the Commission; and to submit their own self-build proposals to the independent evaluator in the form of a binding bid.

At the conclusion of the workshop, Chairman Jaber identified the following subjects to be addressed in a memorandum:

1. Comments on the PACE proposal.

2. Does the Commission have sufficient statutory authority to adopt the proposals to amend Rule 25-22.082 F.A.C.?

3. Is it feasible to require a utility to submit a sealed bid? Does the Commission have the authority to impose such a requirement?

4. Can the Commission impose "prerequisites" that a utility must meet before placing facilities in rate base and/or entering contracts?

5. With respect to PACE's proposal to identify RFP criteria prior to the issuance of an RFP, and the IOU's contention that they need to preserve flexibility of terms, is there a middle ground?

6. Have other jurisdictions fashioned bidding rules/regimes? If so, what are they?

7. What is the concept of "negotiated rulemaking" as it is treated in the Administrative Procedures Act? Does it have application here?

8. Has the Commission identified Rule 25-22.082, F.A.C. during its annual review of rules to determine those for which it no longer has authority? What is the import of those annual reviews?

## I. THE PACE PROPOSAL

To provide a frame of reference for the post-workshop comments on the proposal that PACE distributed on February 7, 2002, PACE will provide here a short synopsis of the major

features of the proposal and a brief exposition of the rationale for PACE's approach.[1]

The PACE proposal incorporates the major thrust of Staff's "Strawman," which is to expand the scope of the rule. History has proven that IOUs will avoid the necessity of issuing an RFP by pursuing units that do not trigger the Siting Act, which presently defines the scope of the rule. The proposed broadening of the rule is a sorely needed improvement, and one which PACE endorses and incorporates in its proposal.

The major features that PACE added to the "Strawman" are (a) the requirement that an IOU present its RFP to the Commission for approval prior to issuance; (b) the requirement that scoring be placed in the hands of a neutral third party; and (c) the requirement that the IOU submit its self-build proposal to the neutral third party for evaluation in the form of a binding bid.

All of these elements proceed from a recognition that, in a proceeding to select capacity additions, the IOU is not an indifferent and objective arbiter. Instead, the IOU is a contestant. It has a significant stake in the outcome; under retail regulation, the return on investment in plant that an IOU receives in the form of retail rates is the principal source of shareholder profits from retail service. In any other competitive setting – ranging from the local rose show and contest to the Miss USA Pageant -- the notion of putting the role of scoring entrants on selecting the winner in the hands of one of the contestants would be rejected immediately as absurd on its face. An analysis of the IOU's incentives will demonstrate that the idea is misplaced also in the context of the competition between wholesale providers and retail-serving IOUs for the opportunity to provide the next capacity addition.

The proposal to require up-front approval of RFP parameters and criteria illustrates the

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[1] For purposes of this summary, only the major features are described. The details of the PACE proposal are contained in the mark-up that was distributed during the February workshop.

point. The measure is needed to ensure that the IOU, which has a vested interest in the outcome of an RFP, does not use the absence of oversight at the outset of the process to discriminate against potential respondents or give its own proposal an undue advantage. This could be accomplished by the inclusion of commercially infeasible terms or terms that disadvantage wholesale providers in favor of the self-build option. To illustrate, assume a hypothetical "antique car" competition. Assume, absurdly, that one of the competitors is assigned the responsibility of establishing the scoring criteria and judging all entrants. The contestant has entered a 1905 vehicle -- the oldest in the competition by far -- but it is in poor condition. If the contestant is free to assign weight to the categories of age and condition as he sees fit, which is he likely to deem more deserving of greater emphasis?

Because incentives to discriminate are powerful and -- absent supervision and oversight -- opportunities for abuse abound, the Commission should review the RFP prior to issuance to assure that the terms are commercially feasible and non-discriminatory.

Similar considerations support the placing of the scoring of the responses in the hands of an independent evaluator. A neutral third party – one that has no stake in the outcome -- is needed to ensure that the criteria of the RFP, once reviewed by the Commission, are applied fairly and objectively.

The third of the three principal elements of PACE's proposal is the requirement that an IOU submit a bid to the neutral scorer, and agree to be bound by its bid. This measure is designed simply to place the IOU on an equal footing with respondents. Respondents are required to be prepared to commit contractually to the terms of their bids. To place the IOU on an equal footing is only fair; however, the real purpose of the measure is to protect ratepayers form shouldering undue costs. It is in the ratepayers' interest to design and conduct the RFP so

that the IOU cannot submit an artificially low cost long enough to secure the right to go forward, only to increase the cost and seek to recover those costs from ratepayers after the fact.

## II. STATUTORY AUTHORITY

### Introduction

During the workshop on February 7, 2002, the investor-owned utilities challenged the sufficiency of the Commission's statutory authority to embrace either Staff's "Strawman" proposal or PACE's proposed amendments to rule 25-22.082, Florida Administrative Code. In this section of the post-workshop brief, PACE will develop the history of the changes to the APA that affect the Commission's rulemaking authority, as that statute has been interpreted and applied by courts of law. PACE will demonstrate that the Commission has ample authority under its empowering statutes to adopt PACE's proposal.

### Summary of Argument

Concerned with the ability of agencies to adopt rules reaching beyond any powers that it had delegated to them under a judicially created standard that required only that rules be "reasonably related" to the agencies' authorizing statutes, in 1996 the Florida Legislature amended the Administrative Procedures Act to codify a more restrictive standard for rulemaking. As amended in 1996, the APA authorized agencies to adopt rules that interpreted, implemented or made specific their "particular powers and duties." Notwithstanding this language, courts soon construed the revised APA to mean that an agency could promulgate a rule if it fell within a "class of powers and duties" granted to the agency by statute.

In response to this new judicial gloss on the 1996 language, in 1999 the Legislature amended the APA again. The 1999 amendments were designed specifically to supersede the case law that interpreted the 1996 revisions. The key provisions of the APA governing an

agency's rulemaking authority now read:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Sections 120.52(8) and 120.536(1), Florida Statutes (2001)

Understandably, the evolution of the statutory standard for rulemaking authority is of interest. However, from the Commission's perspective, as they relate to PACE's proposal the legislative amendments and the cases interpreting those amendments are academic. Resident in Chapter 366, Florida Statutes are general *and* specific powers of the Commission that *pass muster under any of the rulemaking standards established by the Legislature and the courts, before and after the 1996 and 1999 amendments.* The legislative changes do not affect the validity of the Commission's existing capacity procurement rule or impair the Commission's ability to adopt the PACE-proposed amendments to the existing rule.

Among other statutes, Sections 366.05(1), 366.06(02), and 366.07 support the adoption of the PACE proposal. Section 366.05, Florida Statutes, illustrates the type of "general" rulemaking authority that, under current law, is "necessary but not sufficient", in and of itself, to support the adoption of a rule. However, Sections 366.06(2) and 366.07, Florida Statutes, specifically empower the Commission to govern practices of investor-owned electric utilities that are related to, or affect rates. This is a specific power and duty that the Legislation has conferred on the Commission. In conjunction with the general rulemaking authority found in Section

366.05(1), Florida Statutes, these provisions delegate to the Commission precisely the combination of general and specific statutory powers that the amended APA requires to support rulemaking.

Based on oral presentations during the February 7, 2002 workshop, the IOUs may be expected to argue that Sections 366.07 and 366.06(2), Florida Statutes, are "not specific enough." If so, the Commission should reject the argument. During the legislative process that culminated in the language quoted above, legislators considered, but rejected, a proposal to require agencies to demonstrate a statute containing *detailed* powers and duties. They opted instead for the term "*specific*". Consistent with this clear indication of legislative intent, very recent judicial decisions -- involving the interpretation and application of the 1999 legislative amendments to the APA -- emphasize that the amended APA *does not require* an empowering statute to meet a certain prescribed degree or test of specificity. Further, in *Save the Manatee,*[2] the seminal case on the subject, and more recently in *Florida Board of Medicine,* the First District Court of Appeal recognized that a rule will always be more specific than the statute it implements.

The Florida Supreme Court agrees. Its 2001 *Osheyack* decision is a case involving the appeal of an order in which the Commission affirmed the validity of one of its telecommunications rules. On appeal the Florida Supreme Court gauged the sufficiency of Section 364.19, Florida Statutes to support the rule, which allows local exchange companies to disconnect the long distance service of customers who fail to pay their long distance bills. Section 364.19 says only that the Commission has authority to govern contracts between telephone companies and their customers. Absent in the statute is any reference to "long

[2] Full citations to cases are provided in the Argument section that follows.

distance," "termination of service," or "non-payment." The court rejected the argument that the statute was insufficient to meet the criteria of the revised APA, thereby confirming that Section 364.19 is a "specific law" within the meaning of Sections 120.53(8) and 120.536(2), Florida Statutes.

In *Save the Manatee, Florida Medical Association,* and *Osheyack,* (which is analogous to the instant situation in many respects), the courts have signaled agencies that--notwithstanding the 1999 amendments to the APA -- they should not be dissuaded from performing their explicit statutory functions by overreaching claims based on "insufficient" or "non-specific" statutory authority. Accordingly, the Commission can and should interpret the phrase "practices" to include the current IOU practices of selecting capacity additions without first soliciting competitive alternatives, and/or of conducting unfair, discriminatory, and self-serving proceedings that are not designed to identify the most cost-effective option from the ratepayers' perspective. To ensure that practices of investor-owned electric utilities in the area of the selection of capacity additions will impact rates paid by customers in a positive, cost-effective manner, the Commission should adopt PACE's proposed amendments to rule 25-22.082, Florida Administrative Code.

**Argument**

Until 1996, a rule was deemed to be a valid exercise of delegated legislative authority if it was reasonably related to the enabling statute and not arbitrary or capricious. *See General Tel. Co. of Fla. v. Florida Pub. Serv. Commission*, 446 So. 2d 1063 (Fla. 1984); *Department of Labor and Employment Sec., Div. Of Workers' Compensation v. Bradley*, 636 So. 2d. 802 (Fla.1st DCA 1994); *Florida Waterworks Ass'n v. Florida Pub. Serv Commission,* 473 So. 2d 237 (Fla. 1st DCA 1985); Marine Indus. Ass'n of Halies, South Florida v. Dept. of Envt'l Protection, 672

So. 2d 878, 882 (Fla. 4th DCA 1996); Staff of Fla. Senate Governmental Reform and Oversight Committee on CS/SBs 2290 and 2288, Final Staff Analysis 2 (Mar. 21, 1996)(hereafter "Final Staff Analysis"), citing *Dept. of Labor and Employment Security v. Bradley*, 636 So. 2d. 802 (Fla. 1st DCA 1994).

To legislatively "overrule" this body of case law, in 1996 the Florida Legislature amended the APA to restrict agencies' authority to adopt rules. Final Senate Staff Analysis, at 12; Sellers, L., The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform, 48 Fla. L. Rev. 93, 126 (1996). The change in the APA rulemaking standard was intended to foreclose the practice of promulgating rules "reasonably related" to an enabling statute, as well as prevent the promulgation of rules based solely on an agency's general grant of rulemaking authority. Specifically, the Legislature added the following provision to Sections 120.536 and 120.52(8), F.S.:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented also is required. An agency may only adopt rules that implement, interpret, or make specific the powers and duties granted by the enabling statute. No agency shall have the authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and duties of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

Section 120.536(1), F.S. (1996); 120.52(8), F.S. (1996).

The first sentence of this provision emphasized that for an agency to be authorized to adopt rules, the agency must have a general grant of rulemaking authority that must be exercised in conjunction with a specific provision of law that grants particular powers and duties that may be found anywhere in the enabling statute. Boyd, F. Scott, Legislative Checks on Rulemaking Under Florida's New APA, 24 Fla. St. U. L. Rev. 309 (Winter 1997). The second sentence

clarified that "particular," as opposed to "general," powers and duties could be implemented through rulemaking. The third sentence directed administrative law judges not to apply the "reasonably related" standard, and clarified that a rule should not be determined valid merely because it is not arbitrary and capricious and is reasonably related to the enabling statute's purpose. Again, this provision was included to reject earlier case law holding that agencies had legislative authority to adopt rules as long as the rules are reasonably related to the statute's purpose and are not arbitrary and capricious. This sentence further instructed administrative law judges that in the absence of particular statutory provisions, agencies could not engage in rulemaking to implement general statutory policy and statements of intent. The last sentence of the provision clarified that only specific powers and duties conferred on an agency could be implemented or interpreted through rulemaking. *Id.* at 338-339.

Very quickly, judicial decisions eroded the legislative intent underlying the 1996 amendments. The case of *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998), involved an appeal from a final order of the Division of Administrative Hearings (DOAH) invalidating rules promulgated by the water management district. The rules added two new hydrological basins to the water management district and implemented more restrictive permitting and development requirements in those areas. The court concluded that the 1996 changes to the APA restricted rulemaking to only those rules which regulate "[a] matter directly within *the class of powers and duties* identified in the statute to be implemented." *Id.* at 80. (emphasis supplied). The court held that the rules establishing the two new hydrological basins were within the class of powers and duties created by Section 373.413, Florida Statutes, which specifically allowed the district to "delineate areas within the district wherein permits may be required." *Id.* at 81. According to the court,

> [t]he Legislature gave the District authority to identify geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas, and the District did just that. By any name, the Tomoka River and Spruce Creek Hydrologic Basins are delineated geographic areas in which permits are required.

*Id.*

The court held that the other rules, which implemented more restrictive permitting and development requirements in the hydrological basins, were also valid exercises of delegated legislative authority. *Id.* The rules fell within the authority granted in section 373.413, which granted the District the authority to:

> require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part . . . [and] will not be harmful to the water resources of the district.

*Id.*

In holding the rules were valid, the court determined that the term "particular" in Section 120.52(8), F.S., restricted agency rulemaking authority to subjects "directly within the class of powers and duties identified in the enabling statute." It then reasoned that rules identifying geographic areas needing greater protection and imposing stringent environmental standards fell within the "class of powers and duties" delegated by the enabling statute.

In 1999, the Legislature revised the rulemaking standard that it adopted in 1996. The revisions to the APA reflected the Legislature's disapproval of the standard developed in *Consolidated-Tomoka Land Co.* The 1999 changes replaced the sentence,

> "An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute"

with

> "An agency may adopt only rules that implement or interpret the specific powers

> and duties granted by the enabling statute."

Further, the sentence,

> "Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute."

was replaced with

> "Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute."

Commentators reviewing the legislative history of the 1999 amendments to Sections 120.536(1) and 120.52(8) noted that the purpose of the 1999 amendments was to reaffirm the intent of the 1996 legislation to limit agency discretion in rulemaking -- not to further narrow agency rulemaking authority beyond that intended via the 1996 amendments. Significantly, early versions of the amending bills contained the term "*detailed* powers and duties." That term ultimately was deleted due to concerns that it would *too sharply restrict agencies' ability to adopt rules*. Greenbaum, D. and Sellers, L., 1999 Amendments to the Florida Administrative Procedure Act: Phantom Menace or Much Ado About Nothing? 27 Fl. St. U. L. Rev. 499, 504 (1997). The substitution of the term "specific" in place of "detailed" clearly signals the Legislature's intent that the "details" -- i.e., the small and subordinate parts -- of an agency's powers and duties need not be set forth in the statute. As long as the statute confers specific powers and duties -- as opposed to general grants of rulemaking authority -- an agency may adopt rules to implement and interpret that statute. *Id.* at 508.

The First DCA considered the import of the 1999 amendments in *Southwest Florida Water Management District v. Save the Manatee*, Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000). The District appealed a final order of DOAH which declared parts of a rule to be invalid.

The rule provided a "grandfather clause" that exempted certain kinds of developments approved before October 1, 1984, from the permitting requirements imposed on others. In its decision, the court first recognized the Legislature's repeal of the "class of powers and duties" test. Applying the new standard, the court invalidated the District's rule because the disputed sections of the rule did not implement or interpret any specific power or duty granted in the applicable enabling statute. *Id.* at 600.

Based on the facts of the case, the decision is no surprise -- and it does not affect the authority of the Commission to adopt the proposal that PACE presented on February 7, 2002. Section 373.414(9), Florida Statutes, the statute to which the District pointed, granted the District the authority to promulgate rules which establish exemptions to permitting requirements "if such exemptions . . . do not allow significant adverse impacts to occur individually or cumulatively." (Emphasis supplied.) The court observed that the exemptions provided by the rule were not based on the absence of a potential impact on the environment, but were based instead entirely on the date on which a development had been approved. "Because section 373.414(9) does not provide specific authority for an exemption based on prior approval, the exemptions are invalid." *Id.* In other words, in *Save the Manatee* the challenged rule violated an express limitation of the enabling statute on which the agency relied. As will be seen, that is not the case here.

Importantly, in *Save the Manatee,* the court recognized that the analysis of whether an enabling statute authorizes a rule is one which must be made on a case-by-case basis. *Id.* at 599. The court also addressed the Legislature's use in of the word "specific" in 1999 amendments to modify the phrase "powers and duties." *Id.* at 599. The court concluded that, for a rule to be a valid exercise of delegated legislative authority, the authority to adopt the rule "must be based on an explicit power or duty identified in the enabling statute." *Id.* Significantly, however, the

court said the term "specific" was not used in the 1999 statute as a synonym for the term "detailed." *Id.* As the court put it, "[a] rule that is used to implement or carry out a directive will necessarily contain more detailed language than that used in the directive itself." *Id.*

During the February 7 workshop, counsel for the IOUs cited the case of *State of Florida, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.* 794 So. 2d 696 (Fla. 1st DCA 2001). The First DCA addressed a DOAH order invalidating a rule promulgated by the Board which prohibited "cruises to nowhere" from anchoring on sovereign submerged lands. In its notice of proposed rulemaking, the Board identified sections 253.03(7)(a) and 253.03(7)(b), Florida Statutes (1999)[3] as authority for the proposed rule.[4]

Again, the decision was consistent with the requirement that a rule implement a specific power, which, as will be shown, the PACE proposal would do. The *Day Cruise* court noted that although section 253.03(7)(b) does confer rulemaking authority with respect to submerged lands, the provision is limited to rules relating to physical changes or other effects on sovereign land. The Board's proposed rule would have prohibited the anchoring of boats sent by cruise ships to carry passengers who wished to gamble off shore. It did not govern the use of the sea bottom in a way that protected its physical integrity or fostered marine life. *Id.* Further, by purporting to

[3] Section 253.03(7)(a) read: The Board of Trustees of the Internal Improvement Trust Fund is hereby authorized and directed to administer all state-owned lands and shall be responsible for the creation of an overall and comprehensive plan of development concerning the acquisition, management, and disposition of state-owned lands so as to ensure maximum benefit and use. The Board of Trustees of the Internal Improvement Trust Fund has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this act.

Section 253.03(7)(b) read: With respect to administering, controlling, and managing sovereignty submerged lands, the Board of Trustees of the Internal Improvement Trust Fund also may adopt rules governing all uses of sovereignty submerged lands by vessels, floating homes, or any other watercraft, which shall be limited to regulations for anchoring, mooring, or otherwise attaching to the bottom; the establishment of anchorages; and the discharge of sewage, pumpout requirements, and facilities associated with anchorages. The regulations must not interfere with commerce or the transitory operation of vessels through navigable water, but shall control the use of sovereignty submerged lands as a place of business or residence.

[4] Also listed were sections 253.03, 253.04, 253.001, and 253.77, Florida Statutes (1999); as well as Article X, Section 11, Florida Constitution.

interfere with commerce, a matter prohibited by the law, the rule "transgressed" the very statute that the agency invoked as authority to adopt the measure.[5] The case does not help the IOUs' cause. It merely illustrates the dual principles, developed in *Save the Manatee*, supra, that (i) a determination of an agency's authority to adopt a rule is case - and fact - specific and (ii) (sensibly enough) a rule cannot violate an express limitation in the statute on which the rule relies.

In *Osheyack v. Garcia,* 2001 Fla. LEXIS 1573 (Fla. 2001), rehearing denied Order SC96439 (December 21, 2001), the Florida Supreme Court addressed an order of the Commission validating a rule that authorizes a telephone company to disconnect local telephone service for nonpayment of long distance charges. As authority for the rule, the Commission relied upon Section 364.19, Florida Statutes (1999). Section 364.19 states:

> The Commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.

Pursuant to this statute, the Commission promulgated rule 25-4.113, Florida Administrative Code, which provides, in pertinent part:

> (1) As applicable, the company may refuse or discontinue telephone service under the following conditions provided that, unless otherwise stated, the customer shall be given notice and allowed a reasonable time to comply with any rule or remedy any deficiency:
>
> - - - - -
>
> (f) For nonpayment of bills for telephone service, including the telecommunications access system surcharge referred to in Rule 25-4.160(3), provided that suspension or termination of service shall not be made without 5 working days' written notice to the customer, except in extreme cases. The written notice shall be separate and apart from the regular monthly bill for service. A company shall not, however, refuse or discontinue service for nonpayment of a dishonored check service charge imposed by the company, nor discontinue a customer's Lifeline local service

[5]The judges wrote concurring and dissenting opinions. The court certified the question before it to the Florida Supreme Court. One wonders if perhaps the decision to certify reflected the disarray of the court as much as it reflected the significance that it attached to the rule.

> if the charges, taxes, and fees applicable to dial tone, local usage, dual tone multifrequency dialing, emergency services such as "911," and relay service are paid. No company shall discontinue service to any customer for the initial nonpayment of the current bill on a day the company's business office is closed or on a day preceding a day the business office is closed.

Citing the holding of *Save the s, Id.,* that the authority to adopt and administrative rule must be based on an explicit power of duty identified in the enabling statute, the Florida Supreme Court agreed with the Commission's decision that the disconnect rule was "directly and specifically related to the authority granted the Commission over telecommunications contracts pursuant to Section 364.19." *Id.* at 4-5.

The recent case of *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery,* Case No. ID00-3897 (Fla. 1st DCA, 2002) makes the point that a "specific" statutory power need not exhibit a prescribed level of detail even more forcefully. At issue were the following two rules relating to the standards of care that govern surgery performed in a physician's office:

64B8-9.009(4)

> (b) Transfer Agreement Required. The physician must have a transfer agreement with a licensed hospital within reasonable proximity if the physician does not have staff privileges to perform the same procedure as that being performed in the out-patient setting at a licensed hospital within reasonable proximity.

64B8-9.009(6)(b)1.a.

> (b) Hospital Staff Privileges Required. The physician must have staff privileges to perform the same procedure as that being performed in the out-patient setting at a licensed hospital within reasonable proximity.

As support for its rules, the agency invoked Section 458.331(1)(v), Florida Statutes.

Section 458.331(1)(b) states the agency may:

> Establish by rule standards of practice and standards of care for particular practice settings, including, but not limited to, education and training, equipment and supplies, medications including

> anesthetics, assistance of an delegation to other personnel, transfer agreements, sterilization, records, performance of complex or multiple procedures, informed consent, and policy and procedure manuals.

In the case below, the Administrative Law Judge (ALJ) concluded that Section 458.331(a)(v) was not specific enough to sustain either rule. On appeal, the First DCA reversed the ALJ. The court stated:

> The ALJ concluded that this language did not provide rulemaking authority for the transfer agreement provision in rule 64B8-9.009(4)(b) essentially because the grant of authority in section 458.331(1)(v) was not specific enough. Section 458.331(1)(v) clearly grants the Board authority to require by rule that physicians performing level II office surgeries who do not have staff privileges to perform the same procedure at a licensed hospital within reasonable proximity have, instead, a transfer agreement with a licensed hospital within reasonable proximity. As *Save the s* makes clear, *whether the grant of authority is specific enough is beside the point* . . .
>
> . . . .
>
> The ALJ concluded that section 458.331(1)(v) did not provide rulemaking authority for this provision [64B8-9.009(6(b)1.a.)] for essentially the same reason that he concluded it did not provide authority for rule 64B8-9.009(4)(b)-because section 458.331(1)(v) is not specific enough. As previously indicated, the degree of specificity of the grant of authority is *irrelevant*.

*Id.* at 19-20 (emphasis provided).

The court's treatment of the rule that identified "staff privileges" as a qualifying standard is particularly instructive, as "staff privileges" are not mentioned in the empowering statute. The court said:

> Here, it is apparent that this portion of proposed rule 64B8-9.009(6)(b)1.a. is intended to make having staff privileges one of several optional methods by which a physician might establish his or her credentials to perform level III office surgery. Section 458.331(1)(v) clearly gives broad, unqualified, rulemaking authority to the Board to establish standards of care for particular "practice settings." It does not specify what those standards should be, or how they should be established, leaving such matters to the discretion of the Board. It seems to us relatively clear that level III office surgery is a "practice setting" and that the staff privilege provision constitutes a "standard[] of practice [or] standard [] of care."

*Id.* at 20.

Any fair application of the principles espoused in the *Save the s, Osheyack, and Florida Medical Association* cases to the statutes and rule language that were the subjects of the February 7, 2002 workshop leads to only one conclusion: It is within the Commission's statutory power to adopt PACE's proposed amendments to the "bid rule." Chapter 366, Florida Statutes grants the Commission its powers to regulate investor-owned electric utilities. The Chapter includes both general and specific provisions.

The general provision in Section 366.05(1), Florida Statutes, states:

> In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; to employ and fix the compensation for such examiners and technical, legal, and clerical employees as it deems necessary to carry out the provisions of this chapter; *and to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of this chapter.*

(emphasis provided).

Without argument, this is the type of broad statement that, after the 1999 amendments to the APA, is "necessary" but "not sufficient" to support the adoption of a rule.

However, the powers of the Commission are not limited to the general statement contained in Section 366.05(1). For instance, Section 366.07, Florida Statutes, states:

> Whenever the commission, after public hearing either upon its own motion or 56upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, *practices* or contracts, or any of them, *relating thereto,* are unjust, unreasonable, insufficient, excessive, or unjustly

> discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, *practices*, contracts or service, to be imposed, observed, furnished or followed in the future.

(emphasis provided).

Further, Section 366.06(2), Florida Statutes, states:

> Whenever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or *practices of any public utility affecting such rates*, are unjust, unreasonable, unjustly discriminatory, or in violation of law; that such rates are insufficient to yield reasonable compensation for the services rendered; that such rates yield excessive compensation for services rendered; or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used.

(emphasis added).

Read together, these three subsections clearly empower the Commission -- upon determining that practices of a utility relating to or affecting rates are insufficient -- to adopt rules governing the practices to be followed in the future. This is a specific power that the Commission is authorized by the APA, as amended, to implement or interpret by rule. Sections 120.52(8) and 120.536(1), Florida Statutes (2001). Therefore, the Commission is free to interpret the phrase "practice" to include the practice of proceeding with a capacity addition without first conducting a comparative evaluation of alternatives. That practice relates to rates by causing them to be artificially and unnecessarily high. The Commission is similarly free to implement this specific power through a rule designed to establish the desirable practice. The fact that the word "bid" is absent from the statute is no more a hindrance than was the absence of "long distance," "non-payment" and "termination" in the *Osheyack* case or the term "staff

privileges" from Section 458.331(1)(b) in the 2002 *Florida Medical Association* case. The APA requires only that a power be specific. It does not mandate a degree of specificity. *Save the s, supra; Osheyack, supra; Florida Medical Association, supra.*

**Conclusion Regarding Statutory Authority**

While it is true that the Legislature has amended the APA to provide a more restrictive ability of an agency to adopt rules, the Commission has authority to adopt a rule designed to require the practices of the investor-owned utilities in the area of choosing capacity additions to affect customers' rates positively by ensuring that all alternatives are identified and that the process fairly selects the most cost-effective option. Section 366.05(1) confers broad rulemaking authority on the Commission; Sections 366.07 and 366.06(2) confer on the Commission powers that are "specific" within the meaning of the amended APA. As the courts, including the Florida Supreme Court, have made clear, no more is needed. The Commission can, and should, proceed to adopt PACE's proposed amendments to Rule 25-22.082, Florida Administrative Code.

**III.A. IT IS ENTIRELY FEASIBLE TO REQUIRE IOUs TO SUBMIT SEALED BIDS IN AN RFP/EVALUATION PROCESS.**

The Commission also asked the Workshop participants to address the feasibility of requiring IOUs to submit sealed bids to their own requests for proposals. This is at most a question of timing, because an IOU must, necessarily, prepare significant information regarding its self-build or utility-build option before issuing an RFP. Further, it must prepare even more detailed information regarding its self-build option, the costs thereof, revenue requirements impacts thereof, and so on, in any need determination. Ultimately, the requirement for a sealed bid in an RFP process is no different except as to the timing of preparing the information. The IOUs' affiliates, e.g., FPL Energy and TECO Power Services, are surely familiar with submitting sealed bids to utilities in other states where they develop merchant plants and sell wholesale

power. Moreover, at least Florida Power Corporation ("FPC"), through an affiliate, has participated in the submission of sealed bids to a Request for Proposals issued by FPC itself, where those sealed bids, along with other proposals, were evaluated with the assistance of a third-party evaluator engaged for that purpose by FPC.

### III.B. THE PSC HAS AMPLE AUTHORITY TO REQUIRE IOUs TO SUBMIT SEALED BIDS IN POWER SUPPLY PROCUREMENT RFP/EVALUATION PROCESSES, AS WELL AS TO PROMULGATE RULES REQUIRING SAME.

The Commission also asked the Workshop participants to address the authority of the PSC to require an IOU to submit a "sealed bid" for its utility-build option in any evaluation process. PACE submits that the Commission has ample, specific statutory authority to require IOUs to submit such sealed bids and to promulgate rules requiring that practice as part of an evaluation process for power supply proposals.

Section 366.07, Florida Statutes, grants the PSC the specific statutory authority to fix and determine a public utility's practices and contracts affecting rates. This not only gives the PSC the direct statutory power to impose requirements regarding such practices on Florida's public utilities in and pursuant to appropriate proceedings; it also satisfies the "specific statutory authority" requirement needed to support a rule requiring such practices. An IOU's procurement of major power supply resources is clearly a "practice" that affects the utility's rates. If the utility does not get the best deal for its ratepayers, their rates are adversely affected. The utility's procurement practices are supposed to ensure that the utility does in fact get the best deal. Submitting a "sealed bid" in an evaluation process for needed power supplies is similarly a "practice" affecting the utility's rates. A "sealed bid" requirement ensures fairness and objectivity in the evaluation process. The Commission has the requisite authority to impose such requirements -- here, PACE's proposed amendments to the Bid Rule -- that would require public

utilities to submit a "sealed bid" in any power procurement RFP/evaluation process. The Commission has the express authority to promulgate such rules (to implement all provisions of Chapter 366) pursuant to Section 366.05(1), Florida Statutes.

## IV. THE PSC HAS AMPLE STATUTORY AUTHORITY TO IMPOSE PREREQUISITES THAT MUST BE SATISFIED BEFORE PLACING FACILITIES, E.G., POWER PLANTS, IN RATE BASE OR BEFORE ENTERING CONTRACTS.

The Commission also asked the Workshop participants to address the question whether the Commission has the authority to impose prerequisites on an IOU before the IOU can place facilities in rate base or enter long-term contracts, e.g., power purchase agreements ("PPAs"). PACE submits that the Commission has ample, specific statutory authority to impose such requirements, and that the Commission also has ample, specific statutory authority to promulgate rules requiring the satisfaction of such prerequisites.

The Commission's authority to impose such prerequisites derives at least from Section 366.07, Florida Statutes. As noted elsewhere in PACE's comments, Section 366.07 gives the PSC the authority to fix and determine a public utility's practices and contracts affecting rates. Requiring such advance approval of major investments is obviously a practice that affects a utility's rates. In addition, Section 366.04(5), Florida Statutes, gives the Commission

> jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure and adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

This is specific authority to ensure that an inefficient, non-cost-effective power plant is not built. The only way that the Commission can protect against such a result is by imposing appropriate prerequisites on the construction and operation of such a plant. Once an inefficient or uneconomic plant is built, the Commission cannot avoid the adverse consequences to the public

interest.

Advance approval of major power plant investments has been granted by the Commission. In 1991, the Commission granted FPL's petition for advance approval or authorization to include FPL's purchase price for its share of the Scherer 4 power plant in rate base. In Re: Florida Power & Light Company, 1991 WL 501802 Fla. P.S.C., Docket No. 900796-EI, Order No. 24165, January 26, 1991). If the Commission has the statutory authority to grant such advance approval of costs to be included in rate base upon a utility's request, it has the authority to impose it as a prerequisite. The authority to impose prerequisites contemplated by this question is also analogous to the existing requirements, in Rule 25-17.0832(1)-(3), F.A.C., that an IOU must submit a negotiated cogeneration power purchase contract to the Commission within ten days following its execution, and that in reviewing such a PPA for approval, for cost recovery purposes, the Commission will consider several factors, mainly relating to a demonstration that the PPA is needed, cost-effective, and viable. In practice, this means that in Florida, longer-term cogeneration PPAs contain provisions that require PSC approval as a condition precedent to the effectiveness of the PPA. This is exactly the type of prerequisite to cost recovery that is at issue here.

Moreover, public policy, bolstered by the Commission's broad mandate to regulate public utilities in the public interest as an exercise of the police power, strongly supports the Commission's authority to impose such prerequisites. The Commission is charged to protect the public interest, not merely to ensure that the rate impacts of IOUs' decisions are consistent with actions taken in the public interest. In the context of new, major power plants, the public interest requires that the right plant be built at the right cost, not merely that a utility's rates be set as though the right plant were built at the right cost. If a relatively inefficient and non-cost effective

plant is built by an IOU, the State will lose the efficiency and economic benefits of the foregone more efficient, more cost-effective option forever. An ex post prudence review can only remedy such inefficiencies as they affect rates -- it cannot prevent the wrong decision. On the other hand, prerequisites imposed a priori can prevent wrong decisions. Pursuant to Sections 366.07 and 366.04(5), Florida Statutes, the Commission has, as it must have, the authority to ensure that the right resource decisions are made in the public interest.

## V. THE INVESTOR-OWNED UTILITIES HAVE A FAIR DEGREE OF FLEXIBILITY IN DESIGNING THEIR REQUESTS FOR PROPOSALS, INCLUDING FLEXIBILITY IN ESTABLISHING EVALUATION CRITERIA AND THE WEIGHTS TO BE ASSIGNED TO SUCH CRITERIA. THIS FLEXIBILITY, HOWEVER, MUST END AT THE ISSUANCE OF THE RFP IN ORDER TO ENSURE THAT ALL RFP RESPONDENTS KNOW WHAT THEIR TARGET IS AND IN ORDER TO ENSURE A FAIR, PRINCIPLED, OBJECTIVE EVALUATION OF PROPOSALS.

With respect to the issue of RFP evaluation criteria and the weights assigned to such RFP criteria, the Commission asked the Workshop participants to consider whether there might be a "middle ground" between (a) PACE's position that the evaluation criteria, and the weights assigned thereto, must be specified in an RFP when issued, and (b) the IOUs' position that they require flexibility to add or subtract evaluation criteria, and to vary the weights assigned to criteria, during the course of an RFP evaluation process. PACE's answer is that there is no such middle ground.

PACE does not dispute that the IOUs properly have at least a fair degree of flexibility in designing their RFPs on the front end, i.e., before they are issued or submitted to the Commission for approval prior to issuance. At some point, however, that flexibility must end in favor of a defined, non-moving target and in favor of a fair, principled, objective evaluation of all proposals.

Ultimately, whichever entity is to evaluate RFP responses must decide on a set of criteria and weights to be applied uniformly to all responses. This requirement to identify criteria and determine the weights assigned thereto applies equally to an IOU, to an independent third-party evaluator (whether hired by the IOU or by the Commission), or to the Commission. Thus, the question of when the criteria and their weights become "final" is simply one of timing. PACE believes that, in order to ensure a principled evaluation of all proposals, and in order to fairly and adequately inform RFP respondents of what the IOU wants and of what is in the best interests of the IOU's ratepayers and of the State as a whole, the criteria and their weights must be established when the RFP is issued. Otherwise, the RFP would be based on a "moving target," which would make it impossible for the respondents to adequately address the IOUs' needs. In short, one cannot submit a responsive proposal if one doesn't know what is desired.

The IOUs, on the other hand, claim that they want to be able to modify, add to, and subtract from the evaluation criteria, and to vary the weights assigned to certain criteria, as the evaluation process progresses, in order to be "flexible" with respect to the responses. They assert that proposals may include certain features that are not adequately covered by the pre-established criteria. While theoretically possible, it seems unlikely that any such event has ever occurred in an IOU's RFP (in light of the fact that the IOUs have "won" every RFP process pursuant to the Bid Rule since the Rule's inception). Moreover, even if it were to occur, it would simply indicate that the criteria or weights were not adequately specified on the front end.

The Commission should look askance at the IOUs' position in light of the fact that, since the Bid Rule has been in effect, no IOU has been able to find anything in an IPP's response creative or flexible enough to warrant doing anything other than pursuing the utility-build option, which surely and clearly cannot be regarded as requiring any flexibility at all. PACE believes

that the IOUs' "flexibility" argument is no more than an artifice, contrived to enable them to continue winning every one of their RFPs. Requiring front-end identification and establishment of evaluation criteria and their weights will ensure objective, principled evaluations of all proposals but will prevent the IOUs from "adjusting" the criteria, or the weights, or both, to favor their proposals after receiving the responses to an RFP.

The Commission should remember, too, that the purpose of even the existing Bid Rule is to identify a "short list" of proposals for further negotiations. Surely an IOU's allegedly needed flexibility can be more than adequately addressed by selecting the two or three or four proposals that have the most promise based on the primary evaluation, assuming that some flexibility were really required, and then seeking that flexibility in contracts developed through the negotiation process rather than in the evaluation process.

## VI. BIDDING REQUIREMENTS IN OTHER STATES

Numerous states have RFP/Bidding rules and procedures for competitive selection of capacity additions. A few states, such as Louisiana, are just beginning to look at truly competitive bidding processes. Of those states that have rules or procedures for RFPs for selection of capacity, a range of rules are seen. This list is not exhaustive; the regimes listed may be in flux based on the degree of deregulation in each state.

1. **Colorado**--The Colorado Public Utilities Commission has an Integrated Resource Plan rule that requires the use of RFPs for major capacity additions.[6] The Colorado rules have several significant provisions:

COPUC Rule 723-21-8--Defines the purpose and contents of RFPs to include apprising

[6] COPUC Rules 723-21-7 through 723-21-10.

potential bidders of the proposed criteria for the evaluation of bids and clearly specifying the required elements for all bids, such as price and non-price factors. The utility is prohibited from limiting the pool of bidders through unreasonable or excessively restrictive minimum criteria.

COPUC Rule 723-21-9--This rule defines the competitive resource acquisition process. Rule 723-21-9.1 requires the utility to acquire all supply-side resources and demand-side savings, including improvements to the utility's existing generation facilities, pursuant to these procedures. Rule 723-21-9.2 requires the utility to use the competitive acquisitions procedures to competitively acquire all supply-side resources and demand-side savings in which neither the utility, one of its affiliates nor one of its subsidiaries, are bidders, unless it adheres to special procedures for such self-dealing contained in Rule 723-21-9.5. Additionally, the criteria for evaluating the bid must be specified in the RFP. The final selection is made through the IRP process. Rule 723-21-9.5 allows the utility to submit a bid only if it nominates a third-party overseer to monitor the evaluation of bids and to report to the Commission in an independent and unbiased manner. If the utility and the overseer disagree about the resource acquisition to be provided by the utility, the overseer is to provide the Commission with alternatives. Finally, Rule 723-21-10 provides for Commission review and approval of the integrated resource plans that include the capacity acquisition at issue in the RFP. The Commission may approve, disapprove or suggest modifications to the IRP. The Commission shall specifically address the adequacy of the contents of the RFPs and may elect to approve an alternative to the utility's proposed IRP portfolio.

2. **Texas**--Texas has extensive guidelines and rules for selecting resources. The rules were originally enacted in 1996 and were modified in 1998.[7] The overall scheme is within the context of Integrated Resource Planning. Generating electric utilities are subject to the

requirements of the applicable rule. (Section 25.161(b)(1)). If the electric utility has selected resources through a solicitation, it may ask the commission to certify the contracts. (Section 25.161(c)(4)). The guidelines recognize that existing markets are not fully open and fully competitive; therefore a formal solicitation process with regulatory oversight is appropriate. (Section 25.161 (g)(1)-(3)). The utility shall conduct all-source bidding and its evaluation criteria shall consider lowest reasonable system cost, among other things. Section 25.163 relates to acquisition of resources outside the solicitation process under limited circumstances. The circumstances where resources can be acquired outside the solicitation process are limited. Section 25.168 formalizes the solicitation process and provides that a solicitation may be required as part of the IRP process, may be initiated by an electric utility, or may be ordered by the commission. (Section 25.168(a)). The electric utility is required to conduct solicitation for demand-side and supply-side resources. (Section 25-168(b). The RFP is to encourage broad participation and allows for bids from one or more of the utility's affiliates. (Section 25.168(d)). If an affiliate bids, the utility may not give preferential treatment or consideration to that affiliate's bid. Additionally, the utility may not share information including information about customers, electric service needs, loads, costs, prices, etc., unless it is shared equally with all bidders. (Section 25.168(g)). Perhaps most significant is that the utility is required to use and independent evaluator if an affiliate or the utility itself plans to bid. (Section 25.168(h)). The evaluation of the bids must be in accordance with the criteria specified in the RFP. (Section 25.168(i)). The utility may apply to the commission to self-build is the results of the solicitation do not meet the supply-side needs of the utility. (Section 25.168(k)). Final approval or certification of a contract that is reached after the solicitation process is sought from the commission pursuant to Section 25.169. Additionally, the commission must grant a certificate of

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[7] 16 Texas Administrative Code Chapter 25, Sections 25.161 through 25.171.

convenience and necessity for all new generation facilities after consideration of a number of criteria and, if there has been a solicitation and all bids are rejected, the commission shall consider the reported costs of the resource alternatives at the time of certification and in any prudence proceeding. There is a rebuttable presumption that the rejected bids constitute a market-based assessment of the value of new generation units in the context of a proceeding to include the appropriate costs in rate base. (Section 25.171).

3. **Pennsylvania**--The Commonwealth of Pennsylvania has a mandatory competitive bidding provision that applies to purchases of capacity resources.[8] The key provisions of the rule are that a utility or its affiliates can submit offers in a competitive bidding program, but all bids must be evaluated fairly by an independent third-party evaluator. Abusive self-dealing is prohibited. In fact, communication of information between members of work groups within the soliciting utility is prohibited. The RFP shall include necessary information, including the evaluation criteria and major assumptions. An electric utility can file a petition for permission to construct its own generating plant outside of a competitive bidding program, but it is subject to commission approval after full hearing. The utility's self-build option must be the best least-cost option compared to the other options; must have the lowest rate impact; must have the best reliability standards; must offer the greatest improvement in the utility's financial standing; must offer the largest economies of scale and best optimum fuel mix; and must be in the public interest.

4. **Virginia**--The Virginia State Corporation Commission adopted rules pertaining to the use of bidding to purchase electricity from other suppliers.[9] The essential terms of the rules, which were adopted in 1990, require as follows:

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[8] 52 Pa. Code § 57.34(c).
[9] 20 VAC5-301-10 through 301-110.

20 VAC5-301-10--The purpose is to establish minimum requirements for any electric utility bidding program that is used to purchase electric capacity and energy. Electric utilities have the right to establish a bidding program or to secure capacity through other means. All responsibility for developing RFPs, evaluating proposals, and negotiating contracts lies with the utility.

20 VAC5-301-40--The RFP should contain accurate information which, at a minimum, addresses the size, type and timing of capacity; minimum thresholds; major assumptions to be used by the utility in bid evaluation; Preferred location of additional capacity; and specific information concerning the factors involved in determining price and non-price criteria used for selecting winning bids. Potential bidders should have a chance to meet with the utility to discuss the RFP and the utility's capacity needs.

20 VAC5-301-50--Evaluation of bids must be based on criteria identified in the RFP. Bids are to compete with other bids and with the utility's self-build option, including plant life extensions. The utility must be able to demonstrate that it has objectively evaluated its self-build option against the bids received.

20 VAC5-301-60--The utility must develop detailed cost estimated of its own build option and said cost estimates must be current and based on prices likely available. The estimates need not be disclosed to potential bidders, but if they are not identified in the RFP, they must be submitted to the Commission prior to receiving competitive bids.

20 VAC5-301-100--The Commission provides a forum to resolve disputes between a utility and a bidder that may arise as a result of the bidding process. If a utility elects not to implement a bidding process, the Commission will continue its traditional role of arbitrating price, terms and conditions of purchase power contracts if the parties reach an impasse.

Virginia's RFP process is voluntary, and lacks an enforcement mechanism.

5. **Georgia**--The Georgia Public Service Commission has an RFP and Integrated Resource Plan Rule found in Chapter 515-3-4 of the GPSC's General Rules. Essentially that rule requires electric utilities to issue RFPs for new supply-side resources. Specifically, the rule requires a utility to file a draft RFP with the PSC prior to formal distribution and to file a copy of the actual RFP that is issued. It also requires a utility that intends to pursue a self-build option to submit a detailed written proposal as a sealed bid with a copy to an independent accounting firm. Thirdly, the rule requires that the utility's self-build proposal contain the entire cost of the project. Finally, the rule requires the utility to make information on the results of the bid available to the GPSC. One point of interest regarding the Georgia rules are that Chapter 515-3-4.04(3) exempts "repowering" from the RFP process because they amount to "life extension or efficiency improvement of an existing generating plant **that does not require significant capital investment**." Clearly the definition did not contemplate development of new combined cycle units under the guise of "repowering."

6. **Washington--**The Washington Utilities and Transportation Commission also has extensive rules requiring a fair and reasonable competition to fulfill the utility's new resource needs. The material provisions of the Washington bidding rules are as follows:

Rule WAC 480-107-001--The rules are intended to provide a competition to fill a utility's new resource needs on a fair and reasonable basis, however the rules do not preclude electric utilities from constructing electric resources to satisfy their public service obligations.

Rule WAC 480-107-020--An electric utility may allow an affiliate to participate in a bidding process as a power supplier only under conditions set forth in WAC 480-107-160.

Rule WAC 480-107-060--The RFP must be approved by the commission and must

specify the resource block and long-term avoided costs and must explain the evaluation and ranking criteria.

Rule WAC 480-107-100--If there are material changes in the project proposal that ranked first, the utility must re-rank all project proposals.

Rule WAC 480-107-160--Utility subsidiaries may participate in an affiliated utility's bidding process subject to enhanced commission scrutiny designed to ensure that no unfair advantage is given to the bidding subsidiary. Disclosure by the utility to an affiliated subsidiary of the contents of the RFP or competing proposals is deemed to be an unfair advantage. If it is shown that any unfair advantage was given to a bidding subsidiary, rate recovery for the project may be denied in full or in part by the commission.

While the Washington rules appear to be voluntary and do not directly address self-build options, the threat of cost disallowance could help ensure a fair and reasonable process. Research has not revealed any specific cases that demonstrate how well this bidding process has worked.

7. **Wisconsin**--The State of Wisconsin has partially deregulated electric service. Both electric utilities and non-utility generators such as merchant plants can own generation facilities. If there is not enough power available for purchase, a utility is required to issue RFP through the WPSC's bidding process as a way to select among competing offers. The bidders, including the utility, are then evaluated. The utility needing the power recommends to the WPSC the bid it believes will provide the needed power at the least overall cost. The WPSC then decides

8. **Louisiana**--The Louisiana Public Service Commission is the midst of Docket No. R-26172 to formulate rules related to a competitive selection process for capacity additions. All

briefs have been filed and the staff has filed its recommendation. If action is taken prior to hearing in this docket, the position of the Louisiana PSC will be communicated to the Florida PSC in a timely manner.

9. **Michigan**--The Michigan Public Service Commission modified its capacity solicitation procedures in 2000. There is great flexibility for the utilities because the rules are general. An attempt in 1992 to strengthen the rules failed.[10] Whether to approve the utility's selection or choose one of the other alternatives.

10. **Alabama**--Alabama has an RFP process, but it has significant shortcomings that have allowed a Southern Company affiliate to "win" every major RFP solicitation that has been issued by Alabama Power Company (another Southern Company affiliate). One significant shortcoming of the Alabama procedure is that the utility can issue its RFP prior to developing its own self-build proposal, thereby allowing the utility to develop its self-build proposal after seeing all the competition. This can hardly be called a competitive selection process.

**Conclusion Regarding Approaches In Other States**

While there are clearly many different ways to approach competitive capacity additions, some conclusions can be reached and some support can be drawn from the examples discussed. First, the more successful bidding processes, i.e., those that lead to the lowest cost and highest quality capacity additions, are those that share some common themes. Those themes are ones related to fairness of the process, not only during the bidding stage, but also during the RFP drafting stage and the bid evaluation stage. One other essential element is regulatory commission willingness and mechanisms to enforce the requirements of the competitive selection process, even through exclusion of some or all expenditures from rate base if necessary.

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[10] Case No. U-12148, In the Matter of Consumers Energy Company to rescind the Commission's June 12, 1992 Opinion and Order in Case NO. U-9586 and to approve an alternative capacity solicitation process.

The RFP must contain accurate and complete information related to the capacity needed, all factors related to price and non-price criteria, the required elements for all bids, long term avoided costs, the criteria for evaluating the bids, and all major assumptions. It is essential that the RFP cannot contain unreasonable or excessively restrictive minimum criteria so as to limit the pool of bidders. In fact, the RFP should expressly encourage broad participation in the bidding process.

Next, the bidding process itself must be fair. If the utility or an affiliate of the utility is permitted to bid, the utility must not give preferential treatment or unfair advantage to those bids. Further, the utility must be prohibited from sharing information with itself or any affiliate that it does not share equally with all bidders. The utility should be prohibited from disclosing information to an affiliate regarding the contents of the RFP or the competing proposals. Washington State enforces this prohibition by denying rate recovery, in full or in part, if any unfair advantage is shown.

One mechanism for preventing unfair advantage in evaluating a utility's self-build option or the proposal of an affiliate is to require a third-party overseer or independent evaluator any time the utility or an affiliate responds to the RFP. The processes used in Pennsylvania, Colorado, and Texas provide good examples of how this can be accomplished. Use of an independent evaluator that uses the express criteria in the RFP to evaluate and rank the bids will lead to selection of the least-cost, lowest rate impact, most reliable, and most economic capacity addition.

Finally, an integral element of the optimal bidding procedure is adequate oversight and enforcement by the commission, either through restrictions on inclusion in rate base, recovery of costs in rates, or denial of a certificate of convenience and necessity, or through final authority to

select the best alternative among all the bids submitted.

While the bidding procedures in Pennsylvania, Texas, Colorado and Washington seem to offer the best overall schemes for capacity additions, it is clear that some of the best elements of other plans can also provide a substantive basis for a comprehensive bidding rule that addresses the adequacy of the RFP, the fairness of the bidding process, the independence of the evaluation process, and the involvement of the commission.

## VII. NEGOTIATED RULEMAKING

The Commission has requested the interested parties, in their written comments on the draft rule amendments, to address the negotiated rulemaking process. Following is a brief discussion of the process and an analysis of the feasibility of the use of that process in this proceeding.

Section 120.54(2)(d), F.S., authorizes agencies to use negotiated rulemaking in developing and adopting rules. This process involves the designation of a committee of representatives of interested persons for the purpose of developing a mutually acceptable rule proposal. In determining whether to use the negotiated rulemaking process, the agency should consider whether a balanced committee of interested persons who will work in good faith can be assembled. Additionally, the agency is supposed to consider whether the agency could use the group consensus work product as its basis for a proposed rule, and whether the agency is willing to support the work of the negotiating committee as it develops a proposal.

If the agency decides to employ the negotiated rulemaking process for developing a rule proposal, it must publish notice in the Florida Administrative Weekly of the representative groups that will be invited to participate in the process, and other persons may apply to participate. All meetings must be noticed and open to the public, and the negotiating committee

must be chaired by a neutral mediator or facilitator. Section 120.54(2)(d), F.S.; Sellers, L., The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform, 48 Fla. L. Rev. 93 (1996).

The negotiated rulemaking process was informally employed by agencies for years preceding the 1996 amendments to the APA formally authorizing the process. Id. at 108-109. Although the statute generally encourages the use of negotiated rulemaking in the development of complex or controversial rules as a means of generating a consensus work product, a key consideration is whether a committee of persons can be assembled who will work to achieve the objective of a mutually acceptable consensus product. Given the highly polarized positions of the parties in this proceeding, it is questionable whether a working committee could be assembled that would negotiate in earnest to develop a consensus work product. PACE believes an attempt to employ the negotiated rulemaking in this proceeding may ultimately result in substantial delay of amendment of the Bid Rule, with no consensus being reached at the end of a protracted negotiating process. For this reason, PACE submits that the use of negotiated rulemaking in this proceeding would most likely not be efficient or productive.

## VIII. REVIEW OF EXISTING RULES IN LIGHT OF APA AMENDMENTS

In both the 1996 and the 1999 amendments to the APA, the Legislature required agencies to identify rules that lacked the requisite specific statutory authority under the new rulemaking standard enacted by each of the amendments. The agencies' listings of rules for which they lacked the requisite authority were presented to the Legislature for action to grant such authority. Where the Legislature declined to enact such authority, agencies were required to repeal the rules. Rules that were not identified by agencies as lacking statutory authority remain subject to challenge pursuant to the APA.

The Commission did not identify the existing Bid Rule as a rule for which it lacked

statutory authority. Although the statute, Section 120.536(2)(b), authorizes the Joint Administrative Procedures Committee or any substantially affected person to petition agencies to repeal any rules for which they believe there is inadequate statutory authority, neither the Committee nor any of the IOUs nor any other entity has petitioned the Commission to repeal the existing Bid Rule. The events outlined here do not mean that the Rule has achieved "safe haven" status; it merely means that the Commission and the Commission Staff reviewed the Bid Rule and determined to their satisfaction that the Commission has adequate statutory authority for the Rule, and that neither the Joint Administrative Procedures Committee nor any other entity has availed itself of its right to seek repeal of the Rule. The Commission should note that three of Florida's IOUs have issued RFPs in compliance with the Bid Rule since the 1999 amendments. While these events converge on the conclusion that the Rule is valid as it stands from a procedural standpoint there is no statutory prohibition against any substantially affected person, including an IOU, seeking repeal of the existing Bid Rule on the grounds that the Commission lacks the specific statutory power to implement the Rule's requirements. Any such challenge would have to confront the compelling evidence of statutory authority discussed earlier in this memorandum.

## CONCLUSION

For the reasons discussed on February 7, 2002 and amplified herein, the Commission can and should proceed with rulemaking to amend rule 25-22.082.F.A.C. Florida PACE commends, for the Commission's consideration, the proposed amendments that it distributed during the workshop of February 7, 2002.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post-Workshop Memorandum of Florida PACE, was on this 15th day of March 2002, sent (*) Hand Delivery and U.S. Mail, postage prepaid to the following names and addresses:

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