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COMMISSION
CLERK

March 15, 2002

Robert V. Elias
Florida Public Service Commission
2540 Shumard Oak Blvd.
Building G
Tallahassee, FL 32399-0850

Re: Comments of the IOUs regarding potential revisions to Rule 25-22.082, Florida Administrative Code, Selection of Generating Capacity

Dear Mr. Elias:

Please find enclosed the comments of the investor-owned utilities concerning potential revisions to Rule 25-22.082, Florida Administrative Code. If we can provide additional information, please let me know.

Sincerely,

Donna E. Blanton

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# MEMORANDUM

**TO:** Chairman Lila A. Jaber
Commissioner J. Terry Deason
Commissioner Braulio L. Báez,
Commissioner Michael A. Palecki,
Commissioner Rudolph "Rudy" Bradley

**DATE:** March 15, 2002

**SUBJECT:** Comments of the IOUs Regarding Potential Revisions to Rule 25-22.082, Florida Administrative Code, Selection of Generating Capacity

## COMMENTS OF UTILITIES REGARDING POTENTIAL REVISIONS TO RULE 25-22.082

Florida's four investor-owned utilities ("IOUs") -- Gulf Power Company ("Gulf"), Tampa Electric Company ("TECO"), Florida Power Corporation ("FPC"), and Florida Power & Light ("FPL") -- together submit these consensus comments discussing whether or to what extent the Commission should amend Rule 25-22.082 (the "bid rule").

If the Commission wishes to keep a bid rule, the IOUs believe the existing rule effects the proper balance of all considerations. Most importantly, the bid rule protects the interests of the customer in having affordable and reliable electricity. As Commissioner Deason observed during the workshop on February 7, 2002 (the "Workshop"), the existing bid rule was not something the IOUs proposed or enthusiastically embraced when it was adopted. [Workshop Transcript at 98]. The bid rule originated with the Commission and its Staff, and, importantly, it represented an effort to strike an appropriate balance of the same competing considerations faced today. The bid rule favors neither IOUs nor Independent Power Producers ("IPPs"), but it is designed to further the interests of the customer.

The Commission lacks sufficient legislative authority to enact the straw proposal prepared by Staff or the alternative proposed by the Partnership for Affordable Competitive

Energy ("PACE"). If the Commission attempted to adopt either proposal, a Florida Division of Administrative Hearings ("DOAH") administrative law judge ("ALJ") likely would strike the rule as an invalid exercise of the Commission's delegated legislative authority. As discussed in detail below, the Commission does not have specific authority from the Legislature to implement the proposed revisions to the bid rule.

Additionally, the provision in section (11) of the straw proposal and in section (5)(j) of the PACE alternative requiring public utilities to allow competitors to construct generation facilities on utility property is an unconstitutional taking of private property. The proposals effect an unconstitutional taking of private property because the taking does not serve a valid public purpose and, further, the proposals do not provide for just compensation. *See, e.g.,* U.S. Const., Amend. V; Fla. Const., Art. X, § 6; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Baycol, Inc. v. Downtown Development Authority of the City of Fort Lauderdale*, 315 So. 2d 451, 455 (Fla. 1975).

At the workshop, the Chairman and Commissioners asked the IOUs to address certain issues in their written comments. The issues are as follows: (1) address the straw proposal and the PACE alternative and, specifically, the legislative authority for each;[1] (2) submit alternative language for which there is adequate statutory and rulemaking authority;[2] (3) discuss whether there is a middle ground between the existing rule and the proposals;[3] (4) address the possibility

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1 *See* Section I.A. below.
2 *See* Section II.D. below.
3 *See id.*

of the utility submitting a sealed bid to the Commission;[4] (5) discuss whether other states have addressed similar issues;[5] (6) discuss whether the Commission has statutory and rulemaking authority to put in place prerequisites to including facilities in rate base or allowing cost recovery;[6] and (7) discuss negotiated rulemaking.[7] Through these comments, the IOUs address these and other issues Commissioners raised during the course of the Workshop.

## I. Legal Arguments

### A. The Commission Lacks the Necessary Legislative Authority to Enact Either the Straw Proposal or the PACE Alternative

If proposed as rules, both the Staff straw proposal and the PACE alternative presented at the Workshop would constitute invalid exercises of delegated legislative authority pursuant to recent revisions to the Administrative Procedure Act ("APA") and cases interpreting that Act. Both the straw proposal and the PACE alternative violate section 120.52(8), Florida Statutes, which governs the legislative authority agencies must have for their administrative rules.

None of the five statutes listed as "specific authority" for the rule nor the five statutes listed as "law implemented" gives the Commission the specific power to allow another entity to construct an electric generating facility on the public utility's property, to allow the Commission to choose the winner in the RFP process, to require that the utility select finalists in the RFP process for further negotiations, to require the utility to disclose its costs of land and infrastructure, or to require a public utility to go through the RFP process for small capacity

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4 *See id.*
5 *See* Section II.E. below.
6 *See* Section I.A.3 below.
7 *See* Section I.B. below.

additions and repowerings. Similarly, nothing in the cited statutes gives the Commission power to approve or reject a utility's RFP before it is issued or to allow a third-party evaluator to score responses to an RFP.[8] Thus, the straw proposal and the PACE alternative, as currently drafted, are susceptible to successful challenge under section 120.56(2), Florida Statutes, on several grounds.

Section 120.56 is the provision of the APA that governs rule challenges. Section (1) of that statute provides that any person substantially affected by a proposed or existing rule may seek its invalidation on grounds that the rule "is an invalid exercise of delegated legislative authority." That phrase is defined in section 120.52(8). As discussed below, the definition of the phrase was amended in 1996 and 1999, and recent case law has shed light on its meaning. Whether a rule is an "invalid exercise of delegated legislative authority" is the only issue to be decided in a rule challenge proceeding.[9]

An important difference between challenges to proposed rules and to existing rules is that the agency has the burden of proving that the proposed rule is not an "invalid exercise of

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[8] Other provisions of the straw proposal and the PACE alternative also lack specific statutory authority, but we have focused for purposes of these comments on those provisions that generated the most discussion at the workshop and that were identified by the Staff in its analysis as "significant" revisions to the current rule.

[9] An ALJ may consider constitutional issues in a proceeding challenging a proposed rule. *See Department of Environmental Regulation v. Leon County*, 344 So. 2d 297, 298 (Fla. 1st DCA 1977) ("The hearing officer, in the exercise of quasi-judicial authority in furtherance of the administrative rule-making process, can determine whether or not a Proposed rule violates the Florida Constitution if adopted, such determination being subject to judicial review."). Constitutional infirmities in a proposed rule likely would be addressed by the ALJ in the context of the definition of "invalid exercise of delegated legislative authority."

delegated legislative authority" in a proposed rule challenge.[10] Thus, the Commission would be required to prove at DOAH to an ALJ that the Commission has specific statutory authority for each of the challenged provisions of the proposed rule. The ALJ would make the final determination as to whether the rule is invalid. The final order of the ALJ could then be appealed to a Florida District Court of Appeal. § 120.68(2), Fla. Stat.

As background for the IOUs' analysis of the statutory authority for the proposed revisions to rule 25-22.082, an overview of the new rulemaking requirements in the APA and recent court interpretations of those requirements is helpful. These are the standards that would govern a challenge to a proposed rule.

The more stringent rulemaking requirements included in section 120.52(8)[11] were adopted by the Legislature in 1996 and in 1999, and recent case law from the First District Court

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[10] *See* § 120.56(2), FLA. STAT. (2001). *Compare id.* § 120.56(3), which governs challenges to existing rules. A challenger has the burden of proof in existing rule challenges.

[11] This section defines "invalid exercise of delegated legislative authority." It enumerates seven specific grounds for finding a proposed or an existing rule invalid. If any one of these provisions is applicable, the rule is invalid. Additionally, the section includes the unnumbered paragraph that details the link that rules must have to the statutes they implement. Language identical to the unnumbered paragraph is included in section 120.536(1), Florida Statutes. This unnumbered paragraph was added to the definition of "invalid exercise of delegated legislative authority" in 1996 and was amended in 1999 after a court decision undermined the significance of the language. This paragraph has been the focus of the debate concerning the extent of agencies' rulemaking authority. The statute now provides:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

of Appeal upholds the tight link that now is required between agency rules and the statutes they implement.[12] This case law is discussed in more detail below. Put simply, administrative rules now must "implement or interpret a specific power granted by the applicable enabling statute."[13] As the court recently explained:

> Under the 1996 and 1999 amendments to the APA, it is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the

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> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary or capricious;
> (f) The rule is not supported by competent substantial evidence; or
> (g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> 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.

[12] *See State Bd.. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 798 So. 2d 847 (Fla. 1st DCA 2001) (*Day Cruise II*); *State Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696 (Fla. 1st DCA 2001) (*Day Cruise I*); *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

[13] *See Save the Manatee Club*, 773 So. 2d at 596 (emphasis supplied).

> (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.[14]

The court's recent decisions interpreting the new rulemaking requirement follow a decade of effort by the Legislature to force agencies to adopt their policies as rules and to ensure that the rules are no more expansive than the statutes the rules are designed to implement.[15] The Governor's APA Review Commission addressed issues related to rulemaking in its 1996 report, which served as the basis for the 1996 APA amendments. The report noted that under then-valid case law, courts reviewing rule challenge proceedings regularly deferred to an agency's construction of a statute it was charged with enforcing. Courts upheld rules if they were "reasonably related" to the enabling statute or if they were not "clearly erroneous." The report quoted *Department of Labor and Employment Security v. Bradley*, 636 So. 2d 802 (Fla. 1st DCA 1994), which summarized the case law in existence at the time:

> In a rule challenge, 'the burden is upon one who attacks a proposed rule to show that the agency, if it adopts the rule, would exceed its authority; that the requirements of the rule are not appropriate to the end specified in the legislative act; that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation or that the proposed rule or the requirements thereof are arbitrary or capricious.' Another settled principle in the area of administrative rulemaking is that 'agencies are to be accorded wide discretion in

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14 *See Day Cruise I,* 794 So. 2d at 700 (footnote omitted).

15 Numerous commentators have written about the rulemaking requirement and about the amendments to the APA in the 1990s that were designed to strengthen it. *See, e.g.,* Donna E. Blanton, *State Agency Rulemaking Procedures and Rule Challenges*, 75 Fla. B.J. 34 (January 2001); David E. Greenbaum & Lawrence E. Sellers, Jr., *1999 Amendments to the Florida Administrative Procedure Act: Phantom Menace or Much Ado About Nothing?* 27 Fla. St. U. L. Rev. 499 (2000); F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA,* 24 Fla. St. U. L. Rev. 309 (1997); Wade L. Hopping & Kent Wetherell, *The Legislature Tweaks McDonald (Again): The New Restrictions on the Use of 'Unadopted Rules' and 'Incipient Policies' by Agencies in Florida's Administrative Procedure Act*, 48 Fla. L. Rev. 135 (1996).

> the exercise of their rulemaking authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties.' An agency's construction of the statute it administers is entitled to great weight and is not to be overturned unless clearly erroneous . . . the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible ones.

*Bradley*, 636 So. 2d 802, 807 (internal citations omitted) (emphasis in original). *See* Final Report, Governor's Administrative Procedure Act Review Commission, February 20, 1996, at 20 and Appendix N.

The Commission recommended that the Legislature "create a more level playing field" in administrative rulemaking proceedings. *Id.* at 23. During the following session, legislators amended section 120.52(8) by adding the unnumbered paragraph, which was intended to overrule much of the then-settled case law governing rulemaking.[16] Legislators in 1996 also shifted the burden of proof in a proposed rule challenge to the agency. § 120.56(2), Fla. Stat.

Initially hailed as a far-reaching new standard that would sharply reduce agency discretion,[17] the 1996 changes to section 120.52(8) were quickly limited by the First District Court of Appeal in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72, 80 (Fla. 1st DCA 1998). In that case, the court found valid proposed rules creating new standards for managing and storing of surface waters in two basins within the water management district. In upholding the rules, the court stated that the test under the 1996

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[16] *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72, 79 (Fla. 1st DCA 1998) (superseded by statute on other grounds); Wade L. Hopping, Lawrence E. Sellers, and Kent Wetherell, *Rulemaking Reforms and Nonrule Policies: A "Catch-22" for State Agencies?*, 71 Fla. B.J. 20, 23-24 (March 1997); Patrick L. "Booter" Imhof and James Parker Rhea, *Legislative Oversight*, 71 Fla. B.J. 28, 30 (March 1997).

[17] F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA,* 24 Fla. St. U.L. Rev. 309, 341 (1997).

amendment to section 120.52(8) is whether a particular agency rule "falls within the range of powers the Legislature has granted to the agency for purposes of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter within the class of powers and duties identified in the statute to be implemented." *Id.* at 80.

The Legislature in 1999 swiftly overruled the *Consolidated-Tomoka* analysis,[18] amending the unnumbered paragraph in section 120.52(8) to provide as follows:

> 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 or 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 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.

(Emphasis supplied).

The first major court decision interpreting the 1999 language was *Save the Manatee Club*, which involved a challenge to portions of an existing rule of the Southwest Florida Water Management District. The challenged sections of the rule purported to create certain

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[18] This prompt legislative reaction to the *Consolidated-Tomoka* opinion was recognized by the court in both the *Save the Manatee Club* and *Day Cruise I* cases. *Save the Manatee Club,* 773 So. 2d at 599 ("The Legislature has rejected the standard we adopted in *Consolidated-Tomoka*"); *Day Cruise I,* 794 So. 2d at 699 ("In apparent response to the decision in *Consolidated-Tomoka,* the Legislature again amended sections 120.52(8) and 120.536(1) in 1999, stating its intent to clarify the limited authority of agencies to adopt rules in accordance with [the 1996 legislative changes] . . . ."

"grandfather" exemptions from the environmental permitting requirements for certain kinds of developments that were approved before October 1, 1994. The requirements otherwise applied to developments in the district. 773 So. 2d at 596. The Save the Manatee Club challenged the rule, arguing that the grandfather provisions in the rule were invalid because the enabling statute did not authorize exemptions from the permitting requirements based solely on prior governmental approval. *Id.* at 596-97. The statute did, however, authorize exemptions if there was no adverse environmental impact. The ALJ and the First District Court of Appeal agreed that the challenged portions of the rule were invalid because they lacked specific statutory authority. Judge Padovano, writing for the court explained:

> The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*. Either the enabling statute authorizes the rule at issue or it does not. . . .
>
> [W]e conclude that the disputed sections of rule 40D-4.051 are an invalid exercise of delegated legislative authority because they do not implement or interpret any specific power or duty granted in the applicable enabling statute.

*Id.* at 599-600.

The court declined to adopt a bright-line test for determining whether a rule violates section 120.52(8). Instead, the court said determining whether a specific grant of legislative authority exists concerning a challenged rule "must be determined on a case-by-case basis." *Id.* at 599.

The next major rulemaking case to reach the court was *Day Cruise I,* which was decided in September, 2001. The case involved a challenge to a proposed rule of the Board of Trustees of the Internal Improvement Trust Fund, which prohibited "cruise to nowhere" gambling ships

from mooring or anchoring in sovereignty submerged lands. 794 So. 2d at 697. The ALJ found that the proposed rule violated section 120.52(8)(b) because the Trustees had exceeded their rulemaking authority and section 120.52(8)(c) because they had enlarged the specific provisions of law purportedly implemented. *Id.* at 701. The District Court agreed. *Id.* at 704.

One of the statutes purportedly providing authority for the rule, section 253.03(7)(a), generally describes the Trustees' duties and confers general rulemaking authority. The second statute purportedly authorizing the rule, section 253.03(7)(b), confers specific rulemaking authority relating to submerged lands. Despite this specific grant of authority, the District Court of Appeal found that the statute limits the Trustees' submerged lands rulemaking authority to rules governing physical changes to, or other effects on, sovereignty lands and nearby waters. Additionally, such rules must not interfere with commerce or the transitory operation of vessels through navigable water, according to the statute. 794 So. 2d at 702. The proposed rule conflicted with these provisions, the court found, noting:

> Nothing authorizes the Trustees to promulgate a rule prohibiting the use of sovereignty submerged lands on account of lawful activities on board ships at sea which have no physical or environmental effect on sovereignty submerged lands or adjacent waters. Although framed as a regulation of anchoring or mooring, the proposed rule does not regulate the mode or manner of mooring. It does not govern the use of the bottom in any way that protects its physical integrity or fosters marine life. Instead it deliberately and dramatically interferes with certain kinds of commerce solely on account of activities that occur many leagues from any dock.

*Id.*

The court also found that none of the statutes cited as "law implemented" by the Trustees was sufficient, reasoning: "None of the cited constitutional or statutory provisions makes reference to, much less gives specific instructions on treatment of, the 'day cruise industry' or

contains any other specific directive that would provide the support for the proposed rule that the APA now requires." *Id.* at 703.

The Trustees sought rehearing, and the court affirmed its original decision with an opinion further explaining its interpretation. *Day Cruise II,* 798 So. 2d 847 (2001). Rejecting arguments from the Trustees that the *Day Cruise* opinion conflicted with *Save the Manatee Club,* the court stated:

> Not only is our decision fully consonant with the decision in *Save the Manatee Club*, that decision requires the result in the present case. There, in 'recognizing that the Legislature has the right to replace a judicially created test to determine the validity of a rule,' we specifically held 'that the Legislature is free to define the standard for determining whether a rule is supported by legislative authority. . . . In comparison to the rule successfully challenged in the present case, the rule successfully challenged in *Save the Manatee Club* concerned a relatively minor administrative detail, *viz.,* a grandfather clause. At issue here is a rule designed effectively to outlaw a whole 'industry.' We adhere to our decision that, 'if Day Cruise is to be put out of business, the Legislature must do it directly, or amend § 253.03(7)(b) to grant that specific power to the Trustees.'

*Id.* at 847-48 (internal citations omitted).

The court on rehearing also certified a question of great public importance to the Florida Supreme Court concerning the proposed rule. The certified question is whether the proposed rule violates section 120.52(8)(b) or (c). *Id.* It is unclear to what extent the new rulemaking requirement will be analyzed or addressed by the Supreme Court. Only the Trustees' Initial Brief has been filed with the Court. The Answer Brief is due April 2, 2002. Oral argument has been requested by the Trustees, but the Court has not yet ruled on that request.

The First District Court of Appeal recently issued another opinion addressing section 120.52(8), upholding an existing rule and a proposed rule in *Florida Board of Medicine v.*

*Florida Academy of Cosmetic Surgery, Inc.*, 2002 WL 83679 (Fla. 1st DCA January 23, 2002). The rules related to standards of care for office surgery, requiring physicians performing such surgery to have a transfer agreement with a hospital and staff privileges at a hospital for certain types of surgery. Additionally, a proposed rule required that an anesthesiologist be present for certain types of office surgeries. The court specifically analyzed the challenged rules in light of the precedent established in *Day Cruise I* and *Save the Manatee Club*. 2002 WL 83679 *5. The court noted that some provisions were invalidated by the ALJ because they were not specific enough. That type of analysis conflicts with *Save the Manatee Club*, which holds that the question is whether or not specific authority for the rule exists at all. *Id.* Because the statutes in question clearly granted the Board authority to require transfer agreements with hospitals and to provide standards for practice settings, the court found that specific statutory authority existed.[19]

At the Workshop, PACE discussed the Florida Supreme Court opinion of *Osheyack v. Garcia*, 2001 Fla. LEXIS 1573 (June 13, 2001)[20] concerning the new rulemaking standard in section 120.52(8). It is important to note that this case did not involve a rule challenge proceeding brought pursuant to section 120.56, Florida Statutes. The case was not heard at DOAH. Rather, Chester Osheyack filed a petition with this Commission pursuant to section 120.536, Florida Statutes, seeking amendment of rule 24-4.113(1)(f), Florida Administrative

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[19] The proposed rule relating to the presence of an anesthesiologist for Level III office surgery was not challenged based on lack of statutory authority. Rather, it was challenged as arbitrary and capricious because it allegedly conflicted with another rule and, therefore, violated section 120.52(8)(e), and because it restricted competition. The court found that neither argument had merit.

[20] This opinion was issued by the Court as an "Order" and is not published in Southern Reporter or on Westlaw.

Code, governing the refusal or discontinuance of telephone service. *See* Docket No. 990869-TL. The Commission denied Osheyack's petition to amend the rule, finding that the rule met "the standard of reasonableness found in Section 364.19, Florida Statutes."[21] Order No. PSC-99-1591-FOF-TL (Aug. 16, 1999). The Commission also found that the rule was "directly and specifically related to the authority" granted in that statute. *Id.* The Florida Supreme Court agreed with the Commission and cited the *Save the Manatee Club* opinion, but it did not engage in any discussion or analysis of its decision or of the new rulemaking standard. 2001 Fla. LEXIS 1573 *4.

As discussed, the First District Court of Appeal has held that the question of whether a statute contains a specific grant of authority for a rule will be decided on a case-by-case basis. *Day Cruise II*; *Save the Manatee Club*. Although no bright-line test exists to determine whether a proposed or existing rule exceeds delegated authority, clearly a statute must authorize the specific power that is being exercised through the rule. The First District's decisions collectively indicate that agency rules purporting to impose requirements not specifically authorized or contemplated by enabling statutes are likely candidates for invalidation by an administrative law judge.

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[21] As discussed above, the "reasonableness" test was the pre-1996 APA rulemaking standard. There was no discussion in the Florida Supreme Court Order about whether the Commission's finding was appropriate or relevant, given the language in current section 120.52(8) that "[n]o agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation . . . ."

1. The Commission Lacks Specific Legislative Authority to Enact the Straw Proposal

The statutes the Staff cite as authority for the straw proposal do not provide the requisite grant of legislative authority. Virtually all of the provisions of the straw proposal are vulnerable to an attack on grounds of lack of statutory authority, but the IOUs have focused in this analysis on those proposed amendments that Staff identified in the February 7, 2002, handout as "significant." The specific language of these provisions in the straw proposal are as follows:

> (1)(b) 'Capacity addition' means the next generating unit addition of 50 megawatts (MW) or more or modification to an existing generating unit resulting in a net addition of 50 MW or more gross generating capacity planned for construction by a public utility.
>
> (5)(a) Each public utility's RFP shall include, at a minimum:
>
> . . . .
>
> 10. an estimate of the costs of land, improvements, or infrastructure for the site on which the public utility proposes to build the capacity addition, if the site was acquired prior to the issuance of the RFP, or if improvements were made or infrastructure placed prior to the issuance of the RFO.
>
> (11) The public utility shall evaluate the proposals received in response to the RFP in a fair comparison with the public utility's next planned capacity addition. Upon completion of its evaluation, the public utility shall select finalists in order to conduct further negotiations.
>
> (6) A public utility shall allow participants to construct an electric generating facility on the public utility's property. Any fees to be paid by the participant to the public utility for constructing on the public utility's property shall be included as a benefit to the public utility's ratepayers in the cost-effectiveness analysis of the participant's proposal and shall be credited to the public utility's capacity recovery clause.
>
> (14) Upon conclusion of the RFP process, the public utility shall petition the Commission for approval that the public utility's selection of either one or more of the finalist's [sic] proposed purchase power agreements or the proposed capacity addition is the most cost-effective alternative. If the Commission finds

> the proposed purchase power agreement(s) or capacity addition is not the most cost-effective alternative, the Commission may select another proposal from the participants to the public utility's RFP. If the Commission approves a purchase power agreement as a result of the RFP, the Commission shall not preclude the public utility from seeking recovery of the costs of the agreement through the public utility's capacity, and fuel and purchased power cost recovery clauses absent evidence of fraud, mistake, or similar grounds sufficient to disturb the finality of the approval under governing law.

The draft of rule 25-22.082 lists the following statutes as "specific authority" for the rule: sections 350.127(2); 366.05(1); 366.06(2); 366.07, and 366.051. The statutes listed as the "law implemented" are: sections 403.519; 366.04(1); 366.06(2); 366.07; and 366.051. As is evident by the plain language of the statutes, none gives the Commission the specific power to require prior approval of capacity additions not covered by section 403.519, to restrict a utility's discretion concerning how it makes capacity additions, to inject third parties into the utility's decision-making process, or to confiscate utility property for diversion to third-party bidders. [22] The straw proposal does all of those things.

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[22] At the meeting with Staff on March 12, 2002, Bob Elias identified two other statutes as providing specific authority for the rule. These include section 366.01, which provides that "[t]he regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose." Mr. Elias also identified section 366.05(8), which provides in relevant part: "If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, it shall have the power, after proceedings as provided by law, and after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to ensure compliance."

Neither of these statutes provides the Commission with the specific power to adopt the "significant" provisions of the straw proposal. Rather, section 366.01 sets forth "general legislative intent or policy," which is insufficient to support a rule. § 120.52(8), Fla. Stat. Section 366.05(8) authorizes the Commission to require installation or repair of necessary

Statutes cited as "specific authority" include the following:

- Section 350.127(2) is simply a general grant of rulemaking authority. It provides that "[t]he commission is authorized to adopt, by affirmative vote of a majority of the commission, rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it." As previously noted, sections 120.52(8) and 120.536(1) provide that a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule. Thus, this statute is inadequate by itself to authorize any of the proposed amendments.

- Section 366.05(1) generally describes the powers of the Commission and authorizes it to adopt rules to implement those powers. Listed powers include the authority 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 . . . ." (Emphasis supplied).

Although the highlighted language authorizes the Commission to require public utilities to improve their own facilities to promote the public welfare and to ensure "adequate service," the statute falls far short of authorizing the Commission to impose the specific requirements in

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facilities following a determination that inadequacies exist and after "proceedings as provided by law." This statute does not authorize the new legal proceedings that are contemplated in the straw proposal or the PACE alternative. Moreover, section 366.05(8) does not give the Commission specific power to force utilities to open their property to competitors. Finally, ordering "installation or repair of necessary facilities" hardly contemplates imposition of an RFP process for small capacity additions or giving the Commission the power to determine which bidder gets to install the necessary facilities.

the straw proposal. For example, nothing in section 366.05(1) permits the Commission to confiscate a utility's property for use by an IPP to build a generating facility. Similarly, nothing in the statute specifically contemplates the Commission choosing a winner in the RFP process or requiring a utility to negotiate with one or more bidders. Though the Commission has legislative authority to require additions and extensions, it does not have authority to substitute its judgment for that of the utility when determining who will make those additions and extensions.

Statutes cited as "law implemented" include the following:

- Section 403.519 governs the procedure for determination of need subject to the Florida Electrical Power Plant Siting Act (the "Siting Act"). Nothing in section 403.519 gives the Commission the specific power to require public utilities to go through the RFP process for capacity additions of fewer than 75 MW. Section 403.519 provides in pertinent part as follows:

> [T]he [Commission] shall ... determine the need for an electrical power plant subject to the [Siting Act]. ... [T]he [Commission] shall take into account 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. The [Commission] shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

For purposes of the Siting Act, "electrical power plant . . . does not include any steam or solar electrical generating facility of less than 75 megawatts in capacity . . . ." Because the proposed rule requires public utilities to go through the RFP process for capacity additions and modifications to existing capacity of 50 megawatts or greater, the Commission lacks authority for its rule because the statute pertains to facilities with 75 megawatts in capacity or more. In

addition, nothing in the statute provides specific authority for requiring a utility to go through the RFP process for any capacity additions.

Although section 403.519 gives the Commission power to take into account whether a proposed plant is the most cost-effective alternative available, it does not come remotely close to directing a public utility to open its property to an unrelated entity to provide generating capacity, even if that approach might be -- in the view of the Commission -- the most cost-effective alternative.

- Section 366.04(1) concerns the jurisdiction of the Commission. It provides general authority to regulate rates, service, liabilities, and securities of a public utility. The straw proposal itself does not regulate rates, service, liabilities, or securities. Section 366.04(1) does not provide the Commission with the specific authority to implement the provisions of the proposed rule. Even interpreted broadly, the statute only creates general classes of powers and duties, which are insufficient under the APA to support a rule. Moreover, if the statute could be so broadly interpreted as to authorize the provisions of the straw proposal, the Legislature would have had no need to enact section 403.519.

Statutes cited as both "specific authority" and as "law implemented" include the following:

- Section 366.06(2) concerns public utility rates. The Commission is authorized in this rule to determine "just and reasonable" rates and to "promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used." (Emphasis supplied). The plain language of this statute authorizes rules relating to equipment,

facilities, and services only as related to a determination of just and reasonable rates. Although the statute provides general rulemaking authority concerning equipment, facilities, and services in connection with a rate determination, the statute does not grant the specific power for the Commission to adopt any of the "significant" provisions of the straw proposal.

As discussed at the workshop, the straw proposal arguably is within the "class of powers and duties" addressed in section 366.06(2). The Legislature and the courts, however, have made clear that a rule within an agency's class of powers and duties is insufficient. § 120.52(8); *Save the Manatee Club; Day Cruise I.* Similarly, it is not enough that rules are "reasonably related" to the statutes they purport to implement. *Id.* Rules must implement or interpret *specific* powers and duties conferred by a statute. Section 366.06(2) describes general powers and duties, not specific ones.

- Section 366.07 also concerns rates and is substantially similar to section 366.06(2). It provides that when the Commission determines that "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." Like section 366.06(2), section 366.07 is a general statute that does not grant specific power to the Commission to implement the provisions of the straw proposal. Section 366.07 applies only in circumstances where the Commission determines that "service is inadequate or cannot be obtained." The straw proposal does not purport to rely on such findings. Nothing in section

366.07 specifically authorizes the imposition of a requirement that utilities get prior approval before making capacity additions.

- Section 366.051 pertains to cogeneration and related matters. Section 366.051 provides in relevant part:

> The electric utility in whose service area a cogenerator or small power producer is located shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator or small power producer; or the cogenerator or small power producer may sell such electricity to any other electric utility in the state. The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. . . . Public utilities shall provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location, if the commission finds that the provision of this service, and the charges, terms, and other conditions associated with the provision of this service, are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers.

Because the proposed revisions to the rule do not relate to cogeneration and small power production and the purchase of electricity at avoided cost rates, this provision does not grant the Commission the specific authority it needs to implement any portion of the straw proposal.

2. The PACE Alternative Also is an Invalid Exercise of Delegated Legislative Authority

The PACE alternative encompasses many of the provisions of the straw proposal that the Staff identified as "significant" at the Workshop, such as the new definition of "capacity addition," the requirement that a utility's property be taken for use by the winner of the RFP, and the requirement that a utility disclose costs of land and infrastructure in its RFP. The alternative cites the same statutes as "specific authority" for the rule and as "law implemented" that are cited

in the straw proposal. As explained, these statutes do not provide specific authority for proposed rule.

The PACE alternative differs from the straw proposal in that it requires a utility to seek Commission approval of its RFP before the RFP is issued. Participants unhappy with the RFP may file a complaint with the Commission on numerous grounds, including that the RFP is "anti-competitive." (PACE section 7). Perhaps PACE has overlooked *Tampa Electric Co. v. Garcia*, 767 So. 2d 428, which makes clear that the Commission does not have statutory authority to promote competition. 767 So. 2d 428, 435-36 (Fla. 2000) (finding "the Legislature must enact express statutory criteria if it intends such authority for the Commission. Pursuant only to such legislative action will the Commission be authorized to consider the advent of the competitive market in wholesale power promoted by recent federal initiatives. Such statutory criteria are necessary if the Florida regulatory procedures are intended to cover this evolution in the electric power industry").

The PACE alternative also allows the Commission to issue an order on its own motion proposing to modify the RFP. Not only is that provision not authorized by any statute cited as authority for the rule, such procedure is contrary to the Uniform Rules of Procedure with which all agencies must comply. § 120.54(5), Fla. Stat. Rule 28-106.201, which governs initiation of proceedings involving disputed issues of material fact, provides that "[u]nless otherwise provided by statute, initiation of proceedings shall be by written petition to the agency responsible for rendering final agency action." (Emphasis supplied). Although section 403.519 authorizes the Commission to commence a need determination proceeding pursuant to the Siting

Act on its own motion, that statute does not authorize the Commission to initiate a proceeding to modify a utility's RFP. Similarly, sections 366.06(2) and 366.07 authorize the Commission to commence a hearing on rates, but neither statute authorizes the Commission to commence a proceeding to modify a utility's RFP. No other statute cited by the rule allows the Commission to commence a proceeding on its own motion that determines substantial interests.

The PACE alternative also differs from the straw proposal in that it requires a utility to select an "independent evaluator" to score RFP responses and to select the winner. The utility would announce the selection and petition the Commission for "confirmation" of the independent evaluator's selection. (PACE sections 3, 14). As explained in the previous section, the Commission itself does not have specific statutory authority to evaluate responses to bids and select the winner of a utility's RFP process. It cannot possibly, therefore, delegate authority it does not have to a third party such as the "independent evaluator."

The PACE proposal suffers from the same infirmities as the straw proposal; no statute provides the explicit power for any significant provision of the proposal. Thus, the proposal would be found to be an invalid exercise of delegated legislative authority by an ALJ.

3. The Commission Lacks Legislative Authority to Put in Place Prerequisites to Placing Facilities in Rate Base or to Allowing Cost Recovery for Purchased Power Contracts

At the Workshop, Commissioner Deason asked whether the Commission has legislative authority to put in place prerequisites to including facilities in rate base or to getting cost recovery for purchased power contracts. [Workshop Transcript at 72-73]. Nothing outside section 403.519, Florida Statutes, gives the Commission specific authority to require prior

approval of capacity additions. Section 403.519 provides that the Commission shall begin a proceeding to determine the need for an electric power plant subject to the Siting Act and, "[i]n making its determination, the commission shall take into account 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." The section 403.519 determination of need process coupled with the Commission's chapter 366 ratemaking authority places on IOUs the burden to prove that their actions are prudent. If the IOU chooses to construct a power plant, it has the burden of proving the power plant is the most cost effective option. On the back end, section 366.05(1), Florida Statutes, grants the Commission the authority to "prescribe fair and reasonable rates," but the statute does not authorize prerequisites to placing facilities in rate base or prerequisites to submitting purchased power contracts for cost recovery.

4. The Current Rule Was Not Submitted to the Legislature During the "Cure" Period for Existing Rules

Chairman Jaber asked at the Workshop whether rules adopted under the more lenient rulemaking standard prior to the 1996 and 1999 amendments had been deemed valid based on their submission to the Legislature for review. [Workshop Transcript at 44]. The question was related to whether the current version of rule 25-22.082 has adequate statutory authority under the new rulemaking standard.

Section 120.536, Florida Statutes, provided two "cure" periods for agencies whose rules may not have had adequate statutory authority following the 1996 and 1999 amendments to section 120.52(8). Under the first cure period, agencies were required to give the Joint

Administrative Procedures Committee ("JAPC") a list of all rules for which the agency did not believe it had adequate statutory authority under the 1996 standard. The Legislature considered those rules during the 1998 legislative session and provided the necessary statutory authority for many of them. By January 1, 1999, agencies were required to initiate proceedings to repeal rules that had been identified as having inadequate statutory authority and for which the Legislature did not provide such authority. § 120.536(2)(a), Fla. Stat.

A similar "cure" period was authorized by section 120.536(2)(b) following the 1999 amendment to section 120.52(8). Agencies were required to submit rules for which adequate authority did not exist to the Legislature by October 1, 1999. Such rules were reviewed by the Legislature during the 2000 session. If statutory authority was not provided at that time, agencies were required to initiate proceedings to repeal the identified rules by January 1, 2001.

The Commission Staff stated at the Workshop that existing rule 25-22.082 was not among those rules submitted to the Legislature during either "cure" period. [Workshop Transcript at 100]. Thus, it could now be challenged pursuant to section 120.56(3), Florida Statutes, under the current rulemaking standard.

**B. Negotiated Rulemaking is Probably Unworkable**

Chairman Jaber asked at the Workshop for information on negotiated rulemaking and whether it could be used in developing language for rule 25-22.082. [Workshop Transcript at 106]. Section 120.54(2)(d), Florida Statutes, authorizes negotiated rulemaking. This provision

was added in the 1996 rewrite of the APA, but it apparently has been used only once.[23] The process was used by the Department of Business and Professional Regulation ("DBPR") in 1997 to adopt rule 61B-35, which establishes categories of certain minor violations of chapter 723, Florida Statutes, relating to mobile homes.

Section 120.54(2)(d) provides:

> 1. An agency may use negotiated rulemaking in developing and adopting rules. The agency should consider the use of negotiated rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated. The agency should consider, but is not limited to considering, whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of the negotiating committee, and whether the agency can use the group consensus as the basis for its proposed rule. Negotiated rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule.
>
> 2. An agency that chooses to use the negotiated rulemaking process described in this paragraph shall publish in the Florida Administrative Weekly a notice of negotiated rulemaking that includes a listing of the representative groups that will be invited to participate in the negotiated rulemaking process. Any person who believes that his or her interest is not adequately represented may apply to participate with 30 days after publication of the notice. All meetings of the negotiating committee shall be noticed and open to the public pursuant to the provisions of this chapter. The negotiating committee shall be chaired by a neutral facilitator or mediator.
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> 3. The agency's decision to use negotiated rulemaking, its selection of the representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action. Nothing in this subparagraph is intended to affect the rights of an affected person to challenge a proposed rule developed under this paragraph in accordance with s. 120.56(2).

(Emphasis supplied).

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[23] Discussions with the Department of State, which must publish notices of negotiated rulemaking in the Florida Administrative Weekly, with the Florida Conflict Resolution Consortium, and with the Joint Administrative Procedures Committee (JAPC) confirmed this understanding.

The underlined sentence in subparagraph 3. of the statute probably explains why negotiated rulemaking has not been used more frequently. It provides that even if the committee works in good faith and develops a rule agreeable to all concerned, the rule still is subject to challenge by any of those committee members or anyone else. Additionally, the agency is not bound by any rule recommended by the committee. This interpretation was confirmed by JAPC in a letter to the General Counsel of DBPR during that agency's negotiated rulemaking. The letter provides in relevant part:

> The 1996 amendments to the Act created negotiated rulemaking not as an alternative to the usual rulemaking procedures, but as an additional process which an agency might find useful in developing a proposed rule. The agency is not bound by any product of the negotiating committee. Responsibility remains entirely with the statutory entity adopting the rule. . . . The negotiating committee therefore can never produce the 'final product' which you desire.

Letter to Lynda Goodgame from Carroll Webb, July 22, 1997. This letter is attached as Exhibit 1.

Given the consensus among the IOUs that the policy decisions reflected in both versions of the rule are only appropriate for consideration by the Legislature, it is unlikely that any rule remotely resembling either draft could be "negotiated" that would not be challenged by a substantially affected party.

### C. Both the Straw Proposal and the PACE Alternative are Susceptible to a Takings Challenge

Provisions in both proposals requiring IOUs to allow competitors to site facilities on utility property contemplate an unconstitutional "taking" of property within the meaning of the

federal and state constitutions.[24] Takings are unconstitutional if they are for a predominantly private -- as opposed to a public -- purpose, or if the taking is without just compensation. No valid public purpose exists because requiring IOUs to open their property to competitors serves predominantly private purposes. Further, the proposals do not include a provision to calculate just compensation for the taking.

The Fifth Amendment to the United States Constitution prohibits the government from taking private property for public use without just compensation.[25] Similarly, the Florida Constitution prohibits the taking of private property "except for a public purpose and with full compensation."[26]

1. Requiring IOUs to Allow Competitors to Site Facilities on Utility Property is a Per Se "Taking" of Private Property

Requiring public utilities to allow IPPs to construct facilities on public utility property is a physical invasion and, thus, a *per se* taking under the holding of *Loretto v. Teleprompter*

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[24] Though the proposals purport to require utilities to allow competitors to site facilities on their property, Tom Ballinger said at the Workshop that Staff did not intend to go as far as the straw proposal suggested. [Workshop Transcript at 9-10]. Mr. Ballinger said Staff simply wanted utilities to "explore that option, not just dismiss it outright." *Id.* The language of the straw proposal, however, is mandatory.

[25] *See* U.S. CONST., AMEND. V (providing in part "[N]or shall private property be taken for public use, without just compensation"). The Takings Clause of the Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987). A permanent physical occupation authorized by state law is a taking without regard to whether the state, or a party authorized by the state, is the occupant. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

[26] *See* FLA. CONST., ART. X, § 6.

*Manhattan CATV Corp.*, 458 U.S. 419 (1982) ("*Loretto*").[27] In *Loretto*, a property owner challenged a New York statute that prohibited the property owner from interfering with cable television facilities installed on her property.[28] The Court held that the challenged statute, as applied to the property owner in *Loretto*, constituted a taking because the cable television facilities on the property owner's property "involved a direct physical attachment" to the property.[29]

At the Workshop, Commissioner Bradley asked whether property included in rate base is ratepayer -- and not utility -- property. [Workshop Transcript at 89-90]. Settled case law makes clear that, even if revenues collected through rates have helped effectuate the purchase of the property, utility property is still private property and is entitled to constitutional protection from unlawful taking. The United States Supreme Court has long held that "the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property and neither the corpus of that property nor the use thereof constitutionally can be taken for a compulsory price which falls below the measure of just compensation."[30] The fact that a utility gained its property knowing it would be subject to extensive regulation for the public use does not mean its property may be taken for a public purpose without payment of just

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27 *See also Bell Atl. Tel. Cos. v. F.C.C.*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) (finding an FCC order requiring incumbent telephone providers to make their facilities available for use by others was a taking under *Loretto*); *Gulf Power Co. v. U.S.*, 998 F. Supp. 1386, 1395 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999) (holding statute requiring public utility to provide others non-discriminatory access to utility's poles, ducts, conduits, and rights-of-way was taking).

28 *See Loretto*, 458 U.S. at 421-25.

29 *See id.* at 438, 441.

30 *See United Rys. & Elec. Co. v. West*, 280 U.S. 234, 249 (1930), *overruled on other grounds by Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

compensation.[31] The current statutory scheme does not impose a "community property" regime upon either the utilities or the IPPs. Neither should the Commission.

Both the straw proposal and the PACE alternative contemplate a taking of public utility land because the nature of the intrusion of the generators' facilities on public utility property amounts to a permanent physical occupation of property.

2. The Proposals Lack a "Public Use" or "Public Purpose" for the Taking

The proposed rule is a taking of utility land for the private purpose of benefiting a utility's competitor. The state may not take private property for a predominantly private use.[32] To demonstrate that a taking is for a public purpose, the state must show a reasonable necessity for the taking.[33] While taking of land for a public purpose does not require that land be used for a specific public function, projects that benefit the state in a tangible, foreseeable way must be included.[34] An incidental private use of property is proper where the purpose of the taking is clearly and predominantly a public purpose.[35]

Neither the straw proposal nor the PACE alternative states a public purpose. Presumably, the public purpose of the proposed rule is to promote competition by requiring public utilities to allow competitive generators to build facilities on their property. Not only is this a

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31 *See Gulf Power Co. v. U.S.*, 187 F.3d 1324, 1330 (11th Cir. 1999).

32 *See, e.g., Baycol, Inc., v. Downtown Development Authority of the City of Ft. Lauderdale*, 315 So. 2d 451, 455 (Fla. 1975).

33 *See, e.g., Broward County v. Ellington*, 622 So. 2d 1029 (Fla. 4th DCA 1993).

34 *See, e.g., Department of Transportation v. Fortune Federal Savings and Loan Assoc.*, 532 So. 2d 1267, 1269-70 (Fla. 1988).

35 *See, e.g., Baycol*, 315 So. 2d at 456; *Beattie v. Shelter Properties, IV*, 457 So. 2d. 1110, 1113 (Fla. 1st DCA 1984); *City of Miami v. Coconut Grove Marine Properties, Inc.*, 358 So. 2d 1151, 1155 (Fla. 3d DCA 1978).

predominantly private purpose for the taking because the primary beneficiaries are the IPP shareholders, but the taking is not necessary. An IPP may construct facilities on land other than public utility land. As previously discussed, any presumed public purpose of promoting competition is not authorized by statute. *See Tampa Electric Co. v. Garcia*, 767 So. 2d 428, 435-36 (Fla. 2000); *Panda Energy Intl. v. Jacobs*, Fla. Supreme Court No. SC01-284 (February 21, 2002). Even if promoting competition was authorized, requiring IPPs to build on utility-owned property is not necessary to effect that purpose. The public purpose test for taking private property to give to an owner's competitor is not met when the taking is not reasonably necessary to promote that policy.

3. Neither Proposal Includes Adequate Provision for Just Compensation

The Fifth Amendment proscribes the taking of private property without just compensation.[36] To pass constitutional muster, there must exist at the time of taking a "reasonable, certain and adequate provision for obtaining compensation."[37] Neither the straw proposal nor the PACE alternative provides for just compensation to the IOU. Section (6) of the straw proposal and section 5(j) of the PACE alternative simply provide that "[a]ny fees to be paid by the participant to the public utility for constructing on the public utility's property shall be included as a benefit to the public utility's ratepayers in the cost-effectiveness analysis of the participant's proposal, and shall be credited to the public utility's capacity recovery clause."

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[36] *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

[37] *See id.* at 194-95.

Both proposals are constitutionally suspect because there is no provision for determining the amount of compensation awarded to the IOU for the taking of the IOUs' property.

4. The Proposals Will Not Pass the Stricter Test of Scrutiny that Courts Apply When Constitutional Issues Exist

When administrative acts have constitutional implications, courts apply a strict test of statutory authority.[38] For example, in *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), the Federal Court of Appeals for the District of Columbia Circuit addressed a statutory authority challenge to Federal Communications Commission ("FCC") orders requiring incumbent telephone companies to permit collocation of competitive telephone carriers' equipment in the incumbent company's central office.[39] Incumbent telephone companies successfully challenged the FCC collocation orders on grounds that the FCC lacked statutory authority under the Communications Act of 1934 to require incumbent companies to permit physical collocation of equipment upon demand.[40] As authority to require collocation, the FCC cited its general authority to order telephone carriers "to establish physical connections with other carriers . . . ."[41] The court found that this general authority was insufficient when the

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38 *See id.*; *see also Baycol*, 315 So. 2d at 455 (stating that "[t]he power of eminent domain is one of the most harsh proceedings known to the law" and "when the sovereign delegates this power to a political unity or agency, a strict construction must be given against the agency asserting the power").

39 24 F.3d at 1440-41.

40 *See id.* at 1445.

41 *See id.* After the decision in *Bell Atlantic* and as part of the Telecommunications Act of 1996, Congress enacted 47 U.S.C. § 251(c)(6) to provide the FCC with explicit authority to mandate physical collocation as a method of providing interconnection or access to unbundled elements.

administrative act constituted a taking.[42] Although the *Bell Atlantic* court acknowledged that the takings clause prohibited only uncompensated takings and that federal remedies were available to compensate incumbent telephone companies for the taking, it found that the FCC was without statutory authority to enact the orders that would give rise to future claims for compensation.[43] The court said the power of the FCC to order "physical connections" was broad, but it did not "supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LEC's central offices."[44]

Likewise, where state utility commissions have authorized a taking of private property, various state courts have held that state agencies lack the necessary statutory authority to allow a taking of property.[45]

A DOAH ALJ may address constitutional challenges to a proposed agency rule in the context of a rule challenge proceeding.[46] As discussed in Subpart A above, the Commission does not have the requisite statutory authority to require public utilities to allow competitors to construct generation facilities on their land. If the Commission proposes the rule as drafted, or if

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42 *See id.*

43 *See Bell Atlantic*, 24 F.3d at 1447.

44 *See id.*

45 *See, e.g., GTE Southwest, Inc., v. Public Util. Comm'n of Texas*, 10 S.W.3d 7 (TX. Ct. App. 1999) (holding that the PUC had no statutory authority, or authority otherwise implicit in its general powers and duties, to order telecommunications corporation to revise its tariff to allow multi-unit premises to lease or buy corporation's cables and facilities, which amounted to per se taking of corporation's property); *GTE Northwest, Inc., v. Public Util. Comm'n of Oregon*, 900 P.2d 495 (Or. 1995) (holding that PUC lacked express statutory authority to promulgate rules that would effect a taking of telephone local exchange carrier's facilities).

46 *See, e.g., Department of Environmental Regulation v. Leon County*, 344 So. 2d 297 (Fla. 1st DCA 1977); *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982).

it proposes the PACE alternative, the constitutional infirmities of the proposed rule will further buttress a decision that the proposed rule is an invalid exercise of delegated legislative authority.

## II. Both Proposals Present Fundamental Policy Problems and Do Not Serve the Best Interests of Florida Customers

In addition to lacking statutory authority, both the Staff proposal and the PACE alternative present fundamental policy problems. If implemented, the proposals will transform the Commission from utility regulator to utility manager. The responsibility delegated to the Commission by the Legislature is to regulate utilities. Regulation means holding IOUs accountable for the need and prudence of their actions in fulfilling the obligation to serve. As the Commission has recognized, holding IOUs accountable on the back end creates incentives for IOUs to properly fulfill their duties.

The Commission's recent mission statement observes that the Commission would like to move in the direction of lightening the regulatory burden. Yet both the straw proposal and PACE's alternative represent more invasive regulation. Both represent a step in the opposite direction from lightening the regulatory burden on the operation and decision-making of utilities.

The guiding principle in any Commission action is the best interests of the customer. Both proposals lose sight of the customers' interests, in part, because they 1) limit needed utility flexibility; 2) introduce further delay; and 3) increase the regulatory burden, all of which likely will increase costs to the customer.

### A. Both Proposals Limit Needed Utility Flexibility

Requiring an RFP for any new generation, as the straw proposal contemplates, denies the utility the opportunity to respond to changing circumstances. The bid rule was tied to the Power

Plant Siting Act, which had a 50-MW exemption until the Legislature increased it to 75 MW. The Siting Act was intended to apply to large capacity additions with significant environmental and economic impacts. It was inherent in the Siting Act and the bid rule that it would not be used for all capacity additions, including repowerings.

For the same reasons combustion turbines ("CTs") and repowerings are not included in the Siting Act, the Commission should not include them in the bid rule. When utilities are faced with a possible rapid expansion of load above normal, they may not be able to meet the demands caused by rapid load growth if they must issue an RFP prior to adding CTs. Requiring utilities to issue RFPs to add CTs may add one year or more to the process. Installing CTs without a lengthy administrative process should remain an option for the utilities to meet rapid increases in load growth.

Repowering is a limited resource because there are few units remaining to repower. Through repowering, utilities increase the steam generating capacity of utilities up to the boilerplate capacity amount for which the unit was originally approved. Utilities should have the option of repowering to encourage efficiency improvements to existing plants, which will benefit customers.

The need for flexibility in utility planning is a key to serving the customers' needs and best interests. Conditions change and utility planners should retain the tools they need to meet customer needs. In addition to installing CTs and repowerings, utilities may negotiate short-term power purchase agreements. No one of these tools should be favored over the other. Each is important, and each is widely used by the IOUs. Each of the IOUs has a portfolio of power

purchase agreements. Utilities do not favor self-build alternatives above all others, but self-build alternatives -- and equally important, the flexibility to resort to self-build alternatives -- are important to enable utilities to negotiate the best power purchase agreements and to achieve diversity in fuel stocks and flexibility in load following, dispatch needs, the timing of resource availability, the mitigation of market risk, and the balancing of transmission reliability concerns, among other issues. If utilities were forced to bid out every capacity addition, the customers would suffer.

### B. Both Proposals Introduce Further Delay

In addition to limiting utility discretion, expanding the scope of the bid rule, or modifying the existing rule to create additional regulatory procedures and regulatory review that can give rise to challenges to the bidding process, will only further adversely affect the customers' best interests. Instituting front-end review of the RFP process will delay the overall process of adding capacity. The PACE proposal would add a minimum of 30 days to the front end. Also, any regulatory proceeding creates an opportunity for time-consuming, wasteful litigation and delay. Further, appeals on the front end will add substantial delay. When an agency makes a decision that determines substantial interests, adversely affected persons may request a hearing and then appeal the final decision to a Florida District Court of Appeal.[47] Persons will claim to be adversely affected by a decision of the Commission ruling on the propriety or impropriety of an

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[47] *See* § 120.68, FLA. STAT. (2001); *State ex rel. Dept. of General Services v. Willis*, 344 So. 2d 580 (Fla. 1st DCA 1977).

RFP package. If the proposed RFP is disputed, the delay from ensuing litigation could take months or years.

Additional processes designed to ensure a "fair" RFP will not create a presumption of need, nor do they create a presumption of cost-effectiveness such that later challenges are eliminated. For example, the PACE proposal requires an IOU to publish many details about the utility's need and how it proposes to meet that need. The proposal, however, does nothing to address demand side management ("DSM"). Thus, the need determination process would proceed just as it does now, taking the same amount of time. A cost recovery proceeding, such as a rate case, would take the same amount of time it does now. Intervenors and large customers would not hesitate to contest IOU capacity additions just because the Commission blessed an RFP. The opportunities for delay are infinite.

An example of how prolonged litigation can delay needed capacity additions is demonstrated by Panda Energy's recent appeal of this Commission's determination of need in the FPC Hines 2 project. In January 2001, the Commission granted FPC's petition to build a 567-MW gas-fired combined cycle unit at the existing Hines plant site in Polk County. This unit was certified under the Power Plant Siting Act in September of 2001. The unit has an anticipated November, 2003 in-service date. Panda questioned whether FPC properly evaluated proposed bids offered as alternatives to Hines Unit 2. On February 5, 2001, Panda appealed the Commission's approval to the Florida Supreme Court. In February 2002, the Florida Supreme Court affirmed the Commission's determination of need and the propriety of how the

Commission and FPC used the bidding process.[48] Panda's challenge to the Hines Unit 2 project took more than one year. IOUs already must factor delays from litigation into their capacity additions, and additional points of entry and opportunities to challenge Commission decisions will only increase this delay without providing great benefits to consumers. Such challenges increase costs to customers not only by increasing litigation expense, but because they delay engineering and procurement schedules.

### C. Both Proposals Increase Regulatory Burden, Rather Than Lighten It

Both proposals include ideas that run counter to the Commission's stated goal of alleviating regulatory burden. For example, the independent evaluator included in the PACE alternative would not be held accountable for its decision and would invite litigation and further delay. From a policy standpoint, Florida's regulatory scheme imposes the obligation to serve on the IOU with regulatory oversight that the obligation will be discharged responsibly. If an independent evaluator makes generation selection decisions, then IOUs charged with providing an adequate and reliable supply of electricity will not be making the decisions for which they are accountable. The statutes are premised on holding utilities accountable for their management decisions. If the Commission assumes managerial functions, then it should not hold the utilities accountable for decisions the utilities do not and cannot make.

Introducing a third party evaluator into the bidding process is also impractical because of the certainty of further litigation. The process of appointing an independent evaluator will create an additional point of entry to litigate whether the evaluator is truly independent.

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[48] *See Panda Energy Intl. v. Jacobs*, Fla. Supreme Court No. SC01-284 (February 21, 2002).

Another unworkable idea included in the PACE alternative is that of setting scoring criteria in advance. Anticipating at the front end everything that will be evaluated in deciding which capacity addition option to select is not possible. IOUs publish a great deal of criteria in the RFP, but some discretion is needed to ensure that customers benefit.

As was discussed in the recent *Panda* decision at the Florida Supreme Court, publishing detailed RFP and scoring criteria would thwart creativity on the part of bidders. As part of its challenge to FPC's use of the RFP process, Panda asserted that, although the RFP listed price and non-price attributes to be considered in evaluating bids, the RFP did not provide information regarding the weight to be given to either price or non-price attributes.[49] In determining that competent substantial evidence supported the Commission's determination that FPC properly applied the bid rule, the court stated:

> As FPC explains, in every RFP there will be a trade-off between too much information and not enough information, and that if too much detail is included in an RFP, it may become too onerous or off-putting to potential bidders. . . .
>
> With regard to the failure to assign specific weights to various factors, the undisputed testimony at the final hearing indicated that FPC did not assign weights to various factors in advance because FPC wanted to stimulate, rather than limit, creativity in the proposals in order to "bring more value to [the] ratepayers." The unchallenged testimony also explained that in order to allow bidders to give the utility their "best shot" in their proposals, the utility had to retain discretion to exercise subjective judgment about all aspects of the proposals, once the utility had the benefit of evaluating the entire packages.[50]

As it currently exists, the bid rule allows bidders creativity and discretion within criteria included in the RFP package.

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49 *See id.* at 17.

50 *See id.* at 18.

Identifying detailed criteria and scoring in advance has not worked in practice. In 1989, before the current version of the bid rule was adopted, FPL issued a detailed RFP with a complex scoring system. Evaluation of the bids was a resource-intensive process for FPL, and bidders found completion of the package time consuming and expensive. The RFP included ten different areas for scoring, including cost, environmental profile, and financial strength of the bidder. Each area had a number of subcategories, each with its own scoring. It was unworkable because a bidder with a zero score in the financial viability category could score well in all of the other categories, and win the bid. Similarly, a financially secure bidder could score poorly in its environmental profile, yet still score best overall.

Mandating specific criteria and scoring will not guarantee a positive result. The utility must retain discretion to make subjective decisions regarding the best alternative.

The idea of publishing costs in advance without a chance to change costs in response to the bids is anti-consumer and anti-competitive. If the goal of the RFP process is to bring the best value to consumers, the IPPs should submit the lowest possible bid without knowing the exact price to beat from the IOU's bid. A true competitive bidding process does not exist when the IPPs know the exact price to beat. Publishing the IOU's bid in advance encourages the IPPs to bid just below the IOU's published bid.

Requiring IOUs to publish their costs in advance without affording the IOUs an opportunity to respond to the IPPs' bids will hinder the IOUs' effective participation in the RFP process. The IPPs will always bid at an amount just below the IOU's published bid. If IOUs are prevented from meeting or beating the IPPs' bids, the IOUs are deprived of the opportunity to

compete for a project for which they will ultimately be held accountable, and further, customers will suffer. Because IOUs have an enforceable obligation to serve, they should have an opportunity to meet or beat the IPPs' bids.The Commission has no recourse against IPPs, and IOU customers suffer if IPPs fail to perform. Only IOUs have an enforceable obligation to serve the customer.

The lack of an enforceable obligation of IPPs to serve the customer was discussed at the 1993 Agenda Conference when the current bid rule was debated.[51] It was recognized that IOUs are accountable to the Commission and, therefore, to their customers in a way that IPPs are not. Relevant dialogue from the 1993 bid rule Agenda Conference included the following exchange:

> Chairman Deason: What happens then if we go through this long, drawn-out process, which is very complicated and expensive and time-consuming and the end result is a complaint that's filed with the determination of the winner of the RFP, and the Commission makes the decision that: Complainant, you're correct, it was not done fairly and something was misscored or the subjective criteria were biased? So that just means we start all over again, and then that whole time that window of opportunity narrows and that we're just a year further down the road to where the capacity has to be on line or else the lights go out?
>
> Mr. Ballinger: I would like to think that the threat of regulation is a pretty big threat to the utility that they will pursue the right job and the right plant. Because if that were to happen and we were to find, we have remedies for that situation. Whereas, on a non-utility, we don't; they're a non-regulated entity. So I think the threat of regulation over a utility is very strong for them to come forward with the best project.

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[51] *See In the Matter of Proposed Amendment of Rule 22-22.081, F.A.C., Contents of Petition; and Proposed Adoption of Rule 25-22.082, F.A.C., Selection of Generating Capacity*, at 58, Docket No. 921288-EU (December 6-7, 1993).

The situation is the same today as it was in 1993. The Commission does not have authority to regulate IPPs to the same extent and manner that it regulates IOUs, which have the continuing obligation to provide service in a cost-efficient manner.

Competitive procurement alone is not synonymous with promoting the best interests of the customer. The process can be used to burden IOUs with challenges and requests so that IOUs are, eventually, forced to rely on short-term power purchase agreements with IPPs that may not be the most cost-effective alternative. This limits supply options and creates a sellers' market. Also, in contract dealings, IPPs propose to limit their risk as much as possible, bargaining hard to oppose or dilute meaningful liquidated damages provisions or other performance guarantees. In addition, IPP project developers often incorporate a separate affiliate to bid on each project. If IPPs low-bid a power plant proposal that proves infeasible, IOU customers bear the risk of failure of performance. From the IPP point of view, the worst case is they walk away from the project leaving only their single-asset corporate shell with the liability. If, as the IPPs suggest, the IOUs are merely another bidder in the process, then IOUs should be relieved of their obligation to serve.

### D. The Current Bid Rule Achieves the Objective of Serving the Customers' Best Interests[52]

As previously explained, the IOUs believe the current bid rule should not be revised at this time. The rule strikes the appropriate balance among the varying interests while recognizing

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[52] In this subsection, the IOUs address three issues the Chairman and Commissioners raised at the Workshop: 1) the request to submit alternative language for which there is adequate statutory and rulemaking authority; 2) whether there is a middle ground between the existing rule and the proposals; and 3) the possibility of the utility submitting a sealed bid to the Commission.

that the primary purpose of the rule is to serve the best interests of the customer. It represents the middle ground because it requires IOUs to provide a great deal of information and detail up front, but it does not constitute a straightjacket.

Likewise, current laws and rules are not barriers to competitive entry. A wholesale electricity market does exist in Florida. Tom Ballinger said at the Workshop that, for the three Peninsular Florida utilities (FPC, FPL and TECO), approximately 8,500 MW are either installed or planned in the next five years. [Workshop Transcript, pp. 108-09]. Of that, Ballinger said, about 1,500 MW have gone through the RFP process. Not mentioned, however, was that merchant developers propose to add an estimated 8,000 MW of generating capacity in Florida during the next ten years, according to the 2001 Review of Ten-Year Site Plans. Any change in policy to allow greater competitive entry is within the purview of the Legislature. The IOUs are not comfortable proposing alternate language to the two proposals at this time, particularly in light of recent changes to the Florida APA that require a close link between agency rules and the statutes they implement.

If the guiding principle of the bid rule is that customers should benefit from its requirements, the Commission should not remove from the rule the "meet or beat" option for utilities. When a utility is able to meet or beat the lowest bid, customers receive the benefits of the RFP process. The PACE alternative hinders an IOU's opportunity to win an RFP and provide customers with the least-cost option. IPPs will either beat the IOU's price or they will not participate in the RFP process. The Staff proposal requiring a utility to bid in advance makes it unlikely that the utility could provide a self-build option.

Further, the Commission has recognized that introducing an independent evaluator, including the Commission, into the process presents a multitude of issues. The Commission considered and rejected the same idea when it enacted the current bid rule and, again, during a 1998 proceeding regarding Gulf's request for a waiver of portions of the bid rule.[53] Dialogue from the 1993 Agenda Conference regarding the bid rule provides, in relevant part:[54]

> Chairman Deason: That raises an interesting question. Why should the utility provide that cost information up front? Why shouldn't the utility, if it's going to participate in a bid, submit the bid and if it has to be to a third party who takes the bids and makes sure nobody tampers with the bids during the process and then whomever is going to evaluate, whether it's the utility, the Commission or another third party, that the bid is opened and is reviewed and it's scored in some way, and the utility wins or loses. Realizing there is going to have to be some subjective review and analysis utilizing that, we're not envisioning simply you just add up the scores and whatever the highest scores win.
>
> Mr. Ballinger: In this issue there's several, and I spent a lot of time on the stand trying to explain this.
>
> If you go to a mechanism, let's say the utility evaluates all sealed bids. And there is some subjectivity in there, so the utility uses its discretion and ends up selecting itself. Well, that appears to invite litigation.
>
> On the other hand, what is the whole purpose of having a sealed bid? Is it to get the best price? And if that is the reason, then you have to go that step further: If the utility is bidding, are they going to be held to that practice over the life of that contract? Are you going to forego, then, the opportunity to make capital additions and prove to you that they're prudent beyond the life of that contract, realizing that they have the responsibility to keep the lights on?
>
> So it's a multitude of things you have to consider. It's not just whether you score or not; it's if you do this, you have to do B, C and D as well, at least in my opinion.

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[53] *See In re: Petition by Gulf Power Company for waiver of portions of Rule 25-22.082(4)(a), F.A.C., Selection of Generating Capacity*, Agenda Conference in Docket No. 980783-EI (Aug. 18, 1998).

[54] Agenda Conference Transcript, pp. 53-57.

If you have an independent third-party evaluator, I don't think you can find one besides the Commission. That's my own personal opinion. I don't think you can find a consulting firm. There will always be litigation over, "Well, they've done work only for utilities," or "They've only done work for non-utilities," or whatever. The Commission, in my mind, would be an independent evaluator.

Again, then you've gone back to one of the reasons we didn't want bifurcation. We're not recommending that the Commission make these decisions, the utility make these decisions and we review them.

. . . .

Commissioner Johnson: Tom, explain to me once again the rationale why we don't want the Commission to actually evaluate the bid? I mean, you started by saying that we would be the only entity that would be unbiased but we shouldn't be used because why? Explain that.

Mr. Ballinger: Basically, it's a philosophical difference. I don't believe the Commission should be making the management decisions, they should be reviewing them. ... [T]he utility has the statutory obligation to serve. The Commission has the authority, via the grid bill, if we see something is wrong we can mandate the utility to go, not to make those decisions on the front end.

Chairman Deason: Tom, I agree with you except that the statute under which we have to operate, puts, in my opinion, a very heavy burden on the Commission. It says the Commission shall ensure it is the most cost-effective unit in the need determination. It doesn't say the Commission shall review to make sure the unit proposed is reasonable or that the costs are reasonable for ratepayers to pay, or anything like that. It says, "It is the most cost-effective." That's a pretty heavy burden.

Mr. Ballinger: Yes, I differ a little bit because it does say consider whether it is the most cost-effective. I don't know that you could interpret it to say that it is the most cost-effective.

Chairman Deason: There are a lot of parties that come up here and say that it means the most cost-effective unit.

Mr. Ballinger: I'm probably in the minority on that one.

> Mr. Trapp: And I guess the statute, as I understand it, is a determination of need, though. I think the Commission, again, conventionally has placed the burden of proof on the utility to demonstrate.
>
> It's coupled with your authority under 366, in my mind, where the burden of proof is on the utility to demonstrate what they're doing is prudent. And in this case they have an extra burden; they have to demonstrate that the power plant is the most cost-effective.
>
> Again, it goes back to the reason why we think you should require bidding. Bidding is the best way I know to demonstrate that burden of proof; and, unfortunately, with it comes maybe some other issues with regard to, "Well, did you do a prudent, proper bidding instrument and procedure?" But all of that, it seems to me, should be determined by the Commission in a regulatory fashion in the need determination after the utility has made a decision.

As in 1993, the Commission is the regulator of IOUs and should not without reason substitute its decisions for those of the IOU. Likewise, the Commission may not delegate to an "independent" evaluator the job of making IOU management decisions, especially when the Commission itself lacks the statutory authority to make those decisions.

The "meet or beat" option helps fulfill the objective of the bid rule, which is "to encourage the selection of least cost generation." [Transcript of Gulf hearing at 6]. During the proceeding in which Gulf requested a waiver of portions of the bid rule, the Commission made clear that, while utilities must publish details about their "next planned unit" for use by IPP bidders, the utilities should be able to meet and beat IPP proposals in the course of the review process. For example, utilities should be expected to look at bids as they come in to see if the utilities can "sharpen their pencil" when making their own proposal. *Id.* The alternative would be (1) to forbid utilities to do better for their customers than they are able to do, and (2) to encourage IPPs to beat utility-published numbers on the "next planned unit" by one cent -- even

though they could do better -- without risk that the utility could improve its self-build proposal. When the rule was adopted, the intent of including avoided cost data in the RFP was "to provide some basic information for potential bidders" and to "act as a sanity check for the Commission itself when utilities file a need determination." *See id.* "It was not the intent of the rule to hold utilities to the avoided cost data provided in the RFP for cost recovery purposes." *See id.* at 7.

### E. By Having a Bid Rule, Florida is Ahead of Most States[55]

Florida was ahead of many states in adopting a competitive bid rule and most states do not have a similar rule. Besides Florida, four states have competitive bid rules or integrated resource planning ("IRP"): Alabama, Georgia, Idaho and South Carolina. Electric utilities are still regulated in these states. States that have deregulated electric utilities typically have no need for competitive bid rules. They rely on state environmental agencies to issue or deny power plant construction permits. An additional seven states have current proceedings to determine whether to implement competitive bid rules: Colorado, Iowa, Louisiana, Maryland, Montana, Utah and Wisconsin. The remaining states do not have competitive bid rules.

The Florida APA and the tight link it requires between statutes and their implementing rules is unusual among states and is an important consideration when comparing Florida's rules to those in other states. Other states do not require the same level of statutory authority for an agency to implement rules related to competitive bidding.

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[55] This subsection responds to the Commission's request that persons submit comments regarding whether other states have addressed similar issues. [Workshop Transcript at 94].

## III. Conclusion

An ALJ would likely strike the Commission's straw proposal and the PACE alternative as invalid exercises of the Commission's delegated legislative authority. Moreover, the provision requiring public utilities to allow competitors to construct generation facilities on utility property is an unconstitutional taking of private property. To avoid future takings challenges to the rule as applied to public utilities, a judge would find the Commission lacks the necessary statutory authority to enact the proposed rule.

The existing rule reflects a balance of various concerns and interests, and it strikes a middle ground that is working well in practice -- as evidenced by the Commission's approval of need applications -- in the circumstances where it properly applies. Rule 25-22.082 favors neither IOUs nor IPPs, but is designed to further the interests of the customer in having affordable and reliable electricity.

cc: Robert V. Elias
Thomas E. Ballinger

TONI JENNINGS
President

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July 22, 1997

Ms. Lynda Goodgame
General Counsel
Department of Business and Professional Regulation
1940 North Monroe Street
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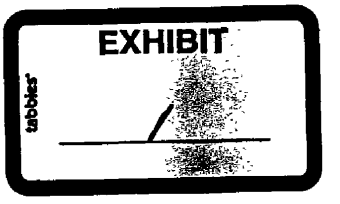
Dear Ms. Goodgame:

Thank you for your recent letter regarding negotiated rulemaking. The Department is to be commended for its consideration of this new process.

I am concerned, however, that your letter seems to confer upon the negotiating committee, and upon its product, a status not granted by the Administrative Procedure Act. The 1996 amendments to the Act created negotiated rulemaking not as an alternative to the usual rulemaking procedures, but as an additional process which an agency might find useful in developing a proposed rule. The agency is not bound by any product of the negotiating committee. Responsibility remains entirely with the statutory entity adopting the rule.

Under recently amended section 723.006, F.S., it is the division which is directed to adopt rules categorizing minor violations. After the proposed rules are developed they must be noticed in the Florida Administrative Weekly and they remain subject to all of the provisions of section 120.54 Florida Statutes. If an affected person timely requests a public hearing on the rules, the division must schedule it, and the division must consider all pertinent material offered. If the small business ombudsman or a substantially affected person submits regulatory alternatives, the division must adopt them, or the division must give certain explanations. If a substantially affected person seeks an administrative determination, the division will have the burden to prove that the rules are not an invalid exercise of delegated legislative authority. If this Committee sends written comments or inquiries on the rules, or objects to them, the division must respond. The division has full authority, and in some circumstances a statutory mandate, to change the rule in response to these processes. The negotiating committee therefore can never produce the "final product" which you desire.



You suggest that it would be helpful if this Committee could review the rule before it is proposed. It must be clearly understood that this Committee cannot take part in a negotiated rulemaking process, any more than we can take part in any other rule drafting. We are statutorily required, not merely authorized, to review all proposed rules which are noticed by an agency. We cannot abdicate this responsibility. Therefore any "pre-notice" review which we conduct cannot preclude review of the rules after notice. At the same time, we appreciate the purpose behind your request, and we will make every effort to informally offer comments to the Department prior to notice of these rules in the Florida Administrative Weekly.

With this understanding of the way in which negotiated rulemaking operates in concert with the other provisions of Florida's APA, and of the statutory role of this Committee, if the Department wishes to proceed with negotiated rulemaking, we would be very pleased to assist you in every way possible. I am certain that the careful preparations you are making will result in a very successful negotiated rulemaking which will serve as a model for other agencies.

Sincerely,

Carroll Webb
Executive Director
and General Counsel

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