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March 20, 2002

- VIA HAND DELIVERY -

Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
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COMMISSION
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IN RE: Complaint of Reliant Energy Power Generation, Inc.
Against Florida Power and Light Company
Docket No. 020175-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and seven (7) copies of Florida Power & Light Company's Motion to Dismiss Reliant's Complaint, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If you or your Staff have any questions regarding this transmittal, please contact me.

Very truly yours,

Charles A. Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Reliant Energy Power)
Generation, Inc. Against Florida Power &)
Light Company)

Docket No. 020175-EI
Filed: March 20, 2002

FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS RELIANT'S COMPLAINT

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), moves to dismiss the Complaint of Reliant Energy Power Generation, Inc. Against Florida Power and [sic] Light Company ("Complaint") for the following grounds:

- (a) Under Rule 25-22.082(8), F.A.C., the proper and exclusive means of raising an alleged violation of Rule 25-22.082, F.A.C., is to contest the resulting determination of need rather than filing a complaint not authorized by rule;
- (b) The Complaint fails to state a cause of action to the extent it argues that FPL violated the "intent" of Rule 25-22.082, F.A.C.;
- (c) The Complaint, if permissible, is untimely as to certain arguments;
- (d) Reliant requests Commission actions as relief that the Legislature has not authorized the Commission to grant;

In support of this motion to dismiss, FPL states:

**Reliant's Proper and Exclusive Remedy For Alleged
Violations of Rule 25-22.082, F.A.C. Is In The Need
Determination Proceedings Resulting From FPL's RFP.**

1. Rule 25-22.082(8), F.A.C., makes it clear that potential suppliers of capacity who participated in a RFP may participate in the resulting power plant need determination. If the

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FPSC-COMMISSION CLERK

Commission had meant to provide a complaint provision in the rule when it was adopted, the Commission certainly could have done so. Instead, the Commission adopted a rule allowing RFP participants to raise such arguments in the ensuing determination of need proceeding. See Rule 25-22.082(8) F.A.C. Thus, the complaint proceeding sought by Reliant is not contemplated or authorized by Rule 25-22.082, F.A.C. Reliant's arguments should be raised where the Commission intended, which is within the determination of need proceedings resulting from the RFP. Reliant's Complaint should be dismissed as being inconsistent with the language of Rule 25-22.082, F.A.C.

**Allegations that FPL Violated the Intent
of a Rule Do Not State a Cause of Action**

2. Reliant's Complaint is replete with statements regarding the "purpose" or "intent" of Rule 25-22.082, F.A.C., with which FPL is alleged not to have complied. See Complaint at ¶¶ 7, 9, 14, 19, 23 and 25. Those statements misinterpret the rule's intent. However, even if they accurately characterized the rule's intent, Reliant would have failed to state a cause of action by alleging that FPL violated that intent. FPL is, of course, obligated to comply with the express requirements of properly adopted rules promulgated within the Commission's substantive and rule making authority. However, FPL has no obligation to divine and comply with any unstated and unarticulated Commission intent that supposedly underlies the Commission's rules. When the language of a statute or rule is clear and unambiguous, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning. T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). Intent is determined primarily from the language of the statute or rule. State v. Cohen, 696 So. 2d 435 (Fla. 4th DCA 1997) Thus, a cause of action alleging a rule violation is limited to the express language of the rule, rather than

Reliant's interpretation of the "intent" behind the rule. In the present case, Reliant plainly states in the first three lines of the Complaint:

Reliant . . . files its Complaint against Florida Power and [sic] Light Company for violation of Rule 25-22.082, Florida Administrative Code.

Despite this clear statement of Reliant's sole basis for the complaint, Reliant proceeds to recite its own interpretations of the Commission's intent in adopting the rule. Reliant cites to no supporting authority. Reliant baldly alleges that FPL "subverted the intent" of the rule. However, nothing in Florida law requires FPL to comply with provisions that are unarticulated in the rule or that stem from Reliant's vague recollection of ideas that the Commission rejected when it adopted the rule. The Commission should dismiss Reliant's allegations that FPL failed to comply with the intent rather than the letter of Rule 25-22.082, F.A.C.

3. Reliant's Complaint alleges that FPL's decision not to consider gas tolling arrangements "effectively undermined the intent of the rule." Reliant Complaint at ¶ 23. This allegation fails to state a cause of action. There is no provision of Rule 25-22.082, F.A.C., that required FPL to consider gas tolling arrangements, or any other confiscatory arrangements, in its RFP. There is no provision of Rule 25-22.082, F.A.C., stating that failure to consider a gas tolling arrangement violates the rule. Because the rule does not even refer to gas tolling arrangements, Reliant is forced to invoke the intent rather than the letter of Rule 25-22.082, F.A.C. Such intent, even if it were accurately stated (which it is not), is not part of the rule and cannot give rise to a cause of action.

4. The entire second count of Reliant's Complaint regarding the terms of FPL's RFP, paragraphs 16-21, completely fails to allege any violation of Rule 25-22.082, F.A.C. The closest allegation is the last sentence of paragraph 19, which states: "Neither purpose comports with the intent of Rule 25-22.082." Reliant fails to allege a violation of Rule 25-22.082 and,

therefore, fails to state a cause of action, because there are no rule provisions that address the specific terms to be included in or excluded from a RFP. In the absence of such rule provisions, the inclusion of terms within a RFP cannot be a violation of the rule. Thus, these allegations fail to state a cause of action. Reliant's attempt to argue that FPL's conduct violates the unstated intent of the rule does not cure this deficiency.

5. Similarly, in the heading that precedes paragraph 25 of the Complaint, Reliant alleges that FPL's conduct "subverted the intent of Rule 25-22.082" and in paragraph 25 Reliant argues that FPL violated "the clear policy of this Commission." These allegations neither allege a violation of any rule nor state a cause of action.

6. Paragraph 24 of the Reliant Complaint attempts a similar but equally deficient approach. Instead of arguing that FPL's conduct violated Rule 25-22.082, F.A.C., Reliant argues that FPL's conduct "breached the terms of its RFP." Setting aside the inaccuracy of this assertion, as the Commission must in passing on a motion to dismiss, FPL simply notes that FPL's RFP is not a part of Rule 25-22.082 and, thus, does not have the force and effect of a rule. (If the RFP did have the effect of a rule, then the RFP terms of which Reliant complains in its earlier count also would have the effect of a rule and therefore could not be challenged here.) Thus, even if FPL did fail to follow the terms of its own RFP (an allegation that FPL denies), then such failure could not rise to a cause of action for a violation of Rule 25-22.082, F.A.C.

7. As set forth more fully in paragraphs 2 through 6 of this motion, four counts of Reliant's Complaint allege violations of the intent of Rule 25-22.082, F.A.C.: Count 2, as to terms of the RFP; Count 4, concerning gas tolling; Count 5, alleging breach of the terms of the RFP; and part of Count 6, which discusses the "totality of the circumstances." All of these counts allege either violations of the unarticulated purpose and intent of the rule or violations of

FPL's RFP document. However, neither "intent" nor the RFP itself can have the force and effect of a rule. Thus, these allegations fail to state a cause of action against FPL and should be dismissed.

**Reliant's Complaint, If Permissible,
Is Untimely As To Certain Arguments.**

8. As previously discussed, the arguments raised by Reliant are properly raised in the determination of need proceeding resulting from FPL's RFP. To the extent Reliant has raised any colorable claim, it can be heard in the need proceedings, as clearly contemplated by the language of Rule 25-22.082(8), F.A.C. Opening a collateral docket independent of the need determination proceedings - on issues that will be tried there - serves no purpose and risks redundant and unproductive regulatory proceedings, which Rule 25-22.082 was adopted to prevent.

9. However, if as Reliant maintains, the Commission may entertain a complaint regarding an RFP outside of a need determination proceeding, then several of Reliant's arguments are untimely and should be barred from consideration. Reliant's second count regarding allegedly commercially infeasible RFP terms and Reliant's fourth count regarding gas tolling arrangements should be barred by waiver, equitable estoppel and the doctrine of laches.

10. Reliant has been aware of the terms of FPL's RFP since August of 2001, when it received FPL's RFP document. Reliant chose to submit three RFP proposals in response to that RFP document rather than raising a complaint with the Commission at that time. (Apparently the terms became commercially infeasible only after it was announced that Reliant did not secure the RFP award.) Reliant also had available, within the RFP process, the means to state exceptions to the terms of the RFP, and declined to do so. FPL relied upon Reliant's proposals, including its failure to take exception to any of the terms of FPL's RFP, and analyzed two of Reliant's three

proposals. As to Reliant's third proposal, which clearly violated the terms of FPL's RFP document, FPL returned Reliant's application fee and heard not a word of complaint for over five months. In Council Brothers v. City of Tallahassee, 634 So. 2d 264 (Fla. 1st DCA 1994), the Court provided the elements that must be present for application of estoppel: (1) a representation as to a material fact that is contrary to a later asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. Given FPL's material reliance upon Reliant's eligible proposals and Reliant's failure to state exceptions within its proposals to the terms of FPL's RFP, Reliant has waived its right to complain and is now estopped from attacking the terms and conditions of FPL's RFP.

11. If a complaint of the RFP's terms is permissible outside of a determination of need proceeding, it should be undertaken at the time of the alleged injury, not months later after the utility has relied upon the respondent's proposals. A timely contest or complaint regarding the RFP terms could have been heard without jeopardizing the entire power plant licensing process, but Reliant's attack six and half months after becoming aware of the terms of the RFP and five months after responding to the RFP without stating any exceptions is not meant to be curative. It is meant to penalize. Reliant's present allegations regarding the terms of the RFP, including the prohibition of gas tolling arrangements, are barred by the doctrine of laches, which applies because Reliant has failed to assert a right for an unreasonable and unexplained length of time, such that prejudice to FPL has resulted. See McIlmoil v. McIlmoil, 784 So. 2d 557, 563 (Fla. 1st DCA 2001).

**Reliant Requests Relief That Is Inconsistent With
Rule 25-22.082, F.A.C., And Which The Legislature
Has Not Authorized The Commission To Grant.**

12. In its Complaint, Reliant has requested relief which the Commission is not authorized to grant under Rule 25-22.082 or any other Commission rule or statute governing the Commission. Reliant seeks the Commission to effectively amend Rule 25-22.082, F.A.C., in this proceeding¹ to grant relief the Commission has previously chosen not to include in Rule 25-22.082, F.A.C. and attempt to enlarge its statutory authority by its own decree. The Commission is a creature of statute limited to those powers expressly conveyed by statute and such other powers as are reasonably implied. City of Cape Coral v. GAC Utilities, Inc. and the Public Service Commission, 281 So. 2d 493, 495-96 (Fla. 1973). Moreover, the Commission cannot promulgate rules without specific authority and cannot enlarge its authority beyond that conveyed by the Legislature. Teleco Communications Co. v. Clark, 695 So. 2d 304, 308 (Fla. 1997).

13. Reliant asks the Commission to require FPL to issue a new RFP as to part of FPL's undisputed capacity need. As part of that requested relief, FPL would have to submit the RFP to the Commission for review of its terms and conditions in advance of its issuance. Reliant also asks the Commission to require FPL to retain a neutral, independent evaluator to score submissions. Finally, Reliant asks the Commission to require FPL to submit a binding "self-

¹ Reliant has requested in its Complaint virtually everything that PACE proposed in its alternative to the Commission Staff's recent straw bid rule revision. As FPL has pointed out in that proceeding, the Commission does not have authority to adopt the PACE rule proposals, and attempting to do so could subject the Commission to a potential rule challenge. Since the Commission lacks that rulemaking authority, it does not have authority to interpret the existing rule to do the same thing. Any attempt to do so would violate Section 120.54(1), Florida Statutes, which requires agencies to adopt their policies through rulemaking. An attempt to develop non-rule policy inconsistent with the current rule would subject the Commission's action to an administrative challenge under section 120.56(4), Florida Statutes.

build bid to the independent evaluator at the same time and manner as other bids. None of this relief is authorized under Rule 25-22.082, F.A.C. When Rule 25-22.082, F.A.C. was adopted, the Commission was asked to impose more restrictive and intrusive rule provisions of the nature Reliant now seeks, and the Commission declined. Reliant effectively is asking the Commission to amend its rule and extend its operation well beyond the scope of the current rule.

14. Reliant is also asking the Commission to act in a fashion that the Legislature has not authorized. Rule 25-22.082, F.A.C., expressly implements Section 403.519, Florida Statutes, which does not give the Commission rulemaking authority and which does not authorize the Commission to (a) require utilities to issue RFPs prior to seeking determinations of need, (b) authorize complaints regarding RFPs, (c) require utilities to reissue RFPs after complaints, (d) require utilities to submit their RFPs prior to the Commission for advance approval, (e) require utilities to retain an independent evaluator to score submissions, or (f) require utilities to submit bids in the same manner and same time as other RFP bidders.

15. The only aspect of Section 403.519, Florida Statutes, that Rule 25-22.082, F.A.C., is intended to address is the statutory need criterion that, in a determination of need proceeding, “the commission shall take into account ... whether the proposed plant is the most cost-effective alternative available.” The relief requested by Reliant goes well beyond what the statute authorizes. All the statute authorizes is the Commission to conduct a determination of need proceeding, applying certain criteria. Reliant asks the Commission to usurp FPL’s role of utility management or to force the utility to divest its management role prior to the determination of need to either the Commission or an undetermined third party evaluator.

16. Reliant also asks the Commission to conduct an evaluation of responses previously submitted to FPL, determine the appropriate price and non-price attributes for judging

the proposals, employ an independent third party evaluator and determine which proposal is most cost-effective and then award a determination of need, even though there would not be a contract with any RFP proposer that might win. None of this is currently authorized in Rule 25-22.082, F.A.C. Reliant is asking the Commission to undertake a wholesale rule amendment and impose intrusive provisions and relief of the type the Commission has previously rejected in adopting Rule 25-22.082. Having promulgated its rule, the Commission is bound to follow it and cannot undertake conduct and provide relief that is not provided in the rule.

17. More importantly, none of the relief requested by Reliant is authorized or even contemplated by Section 403.519, Florida Statute, the statute that Rule 25-22.082, F.A.C. is supposed to be implementing. The Commission's sole role under that statute is to apply the need criteria in a determination of need proceeding. The statute does not authorize a rule requiring a RFP; it does not authorize the Commission to evaluate the results of a RFP (particularly when the Commission's rule regarding RFPs envisions that the utility, not the Commission, will evaluate RFP proposals); it does not authorize the Commission to establish price and non-price attributes to be used in a RFP; it does not authorize the Commission to select an independent third party evaluator to analyze bids. The relief requested by Reliant is an intrusive invasion of the prerogative of FPL's management. This requested relief is unauthorized by rule or statute. The relief requested, award of a determination of need without a contract, is also inconsistent with the Commission's prior interpretation of Section 403.519, Florida Statutes. The Commission has previously held, in a case upheld by the Supreme Court of Florida, that it will not grant a determination of need to an applicant that does not have a contract with a retail serving utility. In re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Generating facility), 92 FPSC 10:693, *affirmed Nassau Power*

Corporation v. Deason, 641 So.2d 397, 399 (Fla. 1994) (“Under the Commission’s interpretation, a non-utility generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered into with a utility.”)

18. Reliant’s invocation of Section 366.07, Florida Statutes, as authority does not enlarge the Commission authority to grant the requested relief. First, Section 366.07 is not listed as either a statute giving the Commission specific authority for adoption of Rule 25-22.082, F.A.C. or a statute implemented by Rule 25-22.082, F.A.C. Section 366.07, Florida Statutes, relates solely to a public utility’s rates and service or rules, regulations, measurements, practices or contracts relating to a public utility’s rates and service. All these matters - rates and applicable rule and regulations relating to rates and service - are set forth in a utility’s Tariff. FPL’s RFP and its practices related to its RFP are not a part of FPL’s rates and are not a part of the electric service FPL provides. Consequently, it is not set forth in FPL’s Tariff. Reliant would have the Commission extensively expand its role under Section 366.07, Florida Statutes, in an unprecedented and unauthorized fashion.

19. Under Reliant’s approach, virtually every aspect of a utility’s conduct would be subject to review by complaint, even though the Commission’s statutory role is to protect customers from unjust, unreasonable, excessive and unjustly discriminatory rates and terms of electric service. For instance, under Reliant’s approach a utility’s employment decisions, which arguably have an indirect on a utility’s rates and service, would not only be subject to review by complaint, but also could be changed after hearing by Commission fiat. Similarly, under Reliant’s approach a frustrated potential supplier of utility poles, wires or even paper clips could file a complaint with the Commission and seek an order requiring FPL to change its pole, wire or paper clip procurement practices. Such an expansive and unprecedented reading of Section

366.07, Florida Statutes, would fundamentally change the role of the Commission, substituting the Commission into the role of utility management rather than regulating the terms of electric service.

20. Most of the relief sought by Reliant in its Complaint exceeds what the Commission has previously determined is appropriate in adopting Rule 25-22.082, F.A.C. and exceeds the authority granted to the Commission by the Legislature in Sections 403.519 and 366.07, Florida Statutes. Thus, these aspects of Reliant's Complaint must be dismissed.

Conclusion

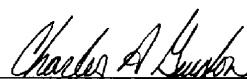
Reliant's Complaint should be dismissed in its entirety because the proper means of raising challenges to a RFP is in the ensuing need determination proceeding. If a complaint challenging a RFP is permissible, then part of Reliant's claims are untimely and should not be heard under the doctrines of waiver, estoppel and laches. The portions of Reliant's Complaint that allege violations of the "intent" of Rule 25-22082, F.A.C., fail to state a cause of action and should be dismissed. Similarly, most of the relief sought by Reliant is not authorized by statute and is inconsistent with Rule 25-22.082, F.A.C., and these requests for relief should be dismissed as well.

WHEREFORE, FPL respectfully requests that the Commission dismiss the Complaint of Reliant Energy Power Generation, Inc. Against Florida Power and [sic] Light Company.

Respectfully submitted,

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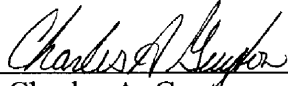
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Florida Power & Light Company's Motion to Dismiss Reliant's Complaint was served by hand delivery upon the following this 20th day of March, 2002:

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