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March 26, 2002

**-VIA HAND DELIVERY-**

Ms. Blanca S. Bayó, Director  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

**Re: 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 Response in Opposition to CPV Cana, Ltd's Petition to Intervene, 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 there are any questions regarding this transmittal, please contact me at 305-577-7083.

Very truly yours,

*Elizabeth C. Dabey*  
*for* Gabriel E. Nieto

- AUS \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM \_\_\_\_\_ Enclosure
- CTR \_\_\_\_\_ cc: Counsel for Parties of Record (w/enclosures)
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
- OPC
- MMS \_\_\_\_\_
- SEC \_\_\_\_\_
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*Hong L. D. N.*  
*4/1/02*

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FPSC-COMMISSION CLERK

**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 26, 2002**

**FLORIDA POWER & LIGHT COMPANY'S  
RESPONSE IN OPPOSITION TO  
CPV CANA, LTD.'S PETITION TO INTERVENE**

Florida Power & Light Company ("FPL"), hereby responds as follows to CPV Cana, Ltd.'s ("CPV's") Petition to Intervene (the "Petition"), and states:

On February 28, 2002, Reliant Energy Power Generation, Inc. ("Reliant") initiated this proceeding by filing a complaint against FPL regarding the process by which FPL solicited competitive proposals for needed generation expansion. FPL timely moved to dismiss the complaint on several grounds: (i) that the exclusive means to challenge a utility's solicitation of proposals is through intervention in the determination of need proceedings for the capacity at issue; (ii) that the complaint failed to state a cause of action as it was based on Reliant's characterization of the intent of Rule 25-22.082, F.A.C., rather than the actual rule language; (iii) that Reliant had failed to raise certain arguments at the appropriate time in the bidding process; and (iv) that the Commission lacks statutory authorization to provide the relief Reliant requested. The Commission has not yet ruled on FPL's Motion to Dismiss Reliant's Complaint ("FPL's Motion to Dismiss").

On March 19, 2002, CPV petitioned to intervene, raising many of the same issues as Reliant. For the reasons discussed in FPL's Motion to Dismiss, the bases for the relief claimed in the Petition are fundamentally flawed. Like Reliant's Complaint, CPV's Petition is deficient both substantively and procedurally. None of the issues raised compels the relief requested and,

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in any case, the matters may only be raised in a determination of need proceeding, not a collateral docket. Furthermore, CPV's alleged injury is not a basis to confer standing. For these reasons, which are discussed in greater detail below, the Petition should be denied.

**I. THE ISSUES RAISED BY CPV MAY ONLY BE RAISED IN A DETERMINATION OF NEED PROCEEDING**

As FPL's Motion to Dismiss explains in detail, Rule 25-22.082(8) makes clear that the issues raised by CPV are cognizable only in a determination of need proceeding. Potential suppliers of capacity who participated in a Request for Proposals ("RFP") may participate in the resulting power plant need determination. If the Commission had meant to provide a mechanism for such suppliers to file separate complaints as Reliant and CPV seek to do, it certainly could have done so when the rule was adopted. 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.

FPL has now filed two determination of need petitions for its generation expansion needs. It fully intends to prove in those proceedings that its chosen options were the most cost-effective alternatives available to meet its needs. To the extent that CPV's Petition raises any colorable claims for which CPV has standing, those claims should be heard within the determination of need proceedings. Id. Opening a collateral docket independent of the need determination proceedings serves no purpose and risks redundant and unproductive regulatory proceedings, which the procedure set forth in Rule 25-22.082 was intended to prevent.

**II. CPV LACKS STANDING**

CPV has failed to allege an injury sufficient to confer standing and its Petition should be dismissed accordingly. Standing to participate in administrative proceedings requires a complainant to show (i) a substantial injury in fact, and (ii) that this injury is of a type or nature

protected by the statute or duly authorized implementing regulation at issue. See Agrico Chem. Co. v. Department of Env'tl. Reg., 406 So. 2d 478 (Fla. 1<sup>st</sup> DCA 1981).

CPV's alleged injury fails the second prong of this test. The only injuries alleged by CPV relate to its status as a potential seller of energy to FPL. However, the only statute even potentially applicable to CPV's claims is section 403.519, Florida Statutes (2001), which is intended to protect a utility's customers (by requiring the utility to choose the lowest cost options for added capacity), not independent power producers such as CPV. And, the protections of the statute apply only in a determination of need proceeding, where the petitioning utility must show that it chose the most cost-effective option based on all relevant circumstances. Thus, CPV has no standing to raise its claims regarding the bidding process in this collateral proceeding.

### **III. ALLEGATIONS THAT ARE NOT BASED ON THE EXPRESS TERMS OF A RULE DO NOT STATE A CAUSE OF ACTION**

The Petition makes several statements regarding the "spirit" or "intent" of Rule 25-22.082, with which FPL is alleged not to have complied. See Petition at ¶¶ 4(e) and 6. Although CPV claims that its allegations are based both on the "letter" and "spirit" of the rule, CPV cites no support for those allegations. Indeed, the very statute being implemented, section 403.519, shows clearly on its face that it is not intended to protect CPV and provides no relief for the matters raised in the Petition. Section 403.519 requires only that in a determination of need proceeding the chosen generation expansion plan be the most cost-effective alternative available, a fact that FPL will demonstrate in the determination of need proceedings it has initiated.

FPL is obligated to comply with the express requirements of properly adopted rules promulgated within the Commission's substantive and rule-making authority. It has, however, no obligation to divine and comply with any unstated and unarticulated Commission intent that

supposedly underlies the Commission's rules. Indeed, intent is determined primarily from the language of the statute or rule. State v. Cohen, 696 So. 2d 435 (Fla. 4<sup>th</sup> DCA 1997). 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). Thus, a cause of action alleging a rule violation is limited to the express language of the rule, rather than CPV's interpretation of the "intent" behind the rule. Accordingly, the Commission should not entertain CPV's allegations to the extent they allege that FPL failed to comply with the intent rather than the letter of Rule 25-22.082.

#### **IV. THE COMMISSION LACKS THE STATUTORY AUTHORITY TO GRANT THE RELIEF REQUESTED.**

In its Petition, CPV has requested relief which the Commission is not authorized to grant under Rule 25-22.082 (or any other applicable rule or statute). That rule expressly implements section 403.519, 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, or (c) require utilities to reissue RFPs after complaints.

Not only does CPV seek to have the Commission effectively amend Rule 25-22.082 in this proceeding to grant relief the Commission has previously chosen not to include in that rule, CPV's petition would have the Commission enlarge its statutory authority by administrative decree.<sup>1</sup> This is relief the Commission cannot grant, even if it were so inclined. The

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<sup>1</sup> CPV's Petition, on the coattails of Reliant's Complaint, has requested relief similar to that which the Partnership for Affordable Competitive Energy (PACE) proposed in an alternative to the Commission Staff's recent straw bid rule revision. As FPL pointed out in that proceeding, the Commission does not have authority to adopt the PACE rule proposals,

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). 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).

The only aspect of section 403.519 that Rule 25-22.082 is intended to address is the statutory need criterion that “the commission shall take into account ... whether the proposed plant is the most cost-effective alternative available.” The relief requested by CPV goes well beyond what the statute authorizes. The statute only authorizes the Commission to conduct a determination of need proceeding, applying the above criteria.

None of the relief requested by CPV is authorized or even contemplated by section 403.519. As noted, the Commission’s sole role under that statute is to apply the need criteria in a determination of need proceeding. The relief requested by CPV is therefore an unwarranted and intrusive invasion of the prerogative of FPL’s management, which the Commission is not authorized to grant.<sup>2</sup>

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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 (2001), 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 (2001).

<sup>2</sup> Nor does section 366.07, Florida Statutes (2001), empower the Commission to grant the relief CPV requests. First, section 366.07 is not listed as either a statute giving the Commission specific authority for adoption of Rule 25-22.082 or a statute implemented by that rule. Section 366.07 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. 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.

FPL recognizes that the issues raised herein will likely be influenced by the Commission's decision on FPL's Motion to Dismiss Reliant's Complaint, as the same issues are implicated there. Indeed, if Reliant's Complaint is dismissed then CPV's Petition would be rendered moot, since there would be no proceeding in which to intervene. For that reason, FPL respectfully suggests that the Commission defer ruling on CPV's Petition until such time as the Commission renders a decision on FPL's Motion to Dismiss.

**Conclusion**

For the foregoing reasons, CPV's Petition to Intervene should not be granted.

Respectfully submitted,

R. Wade Litchfield, Esq.  
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By: Elizabeth C. Daley FBN 0104507  
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**CERTIFICATE OF SERVICE**  
**Docket No. 020175-EI**

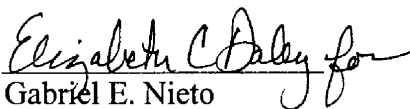
I hereby certify that a copy of Florida Power & Light Company's Response to CPV Cana's Petition to Intervene was served by U.S. Mail upon the following this 26<sup>th</sup> day of March, 2002:

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