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March 27, 2002

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020175-EI

Re: Docket No.: ~~020165-EI~~

Dear Ms. Bayo:

On behalf of Reliant Energy Power Generation, Inc., I am enclosing the original and 15 copies of Reliant Energy Power Generation, Inc.'s Response to Florida Power and Light Company's Motion to Dismiss.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and pleading by returning the same. Thank you for your assistance in this matter.

Thank you for your assistance in this matter.

Yours truly,

Joe McGlothlin

Joseph A. McGlothlin

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION ORIGINAL

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

Docket No. 020175-EI

Filed: March 27, 2002

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RELIANT ENERGY POWER GENERATION, INC.'S RESPONSE TO FLORIDA POWER AND LIGHT COMPANY'S MOTION TO DISMISS

Pursuant to Rule 28-106.204, Florida Administrative Code, Reliant Energy Power Generation, Inc. (Reliant Energy), through its undersigned counsel, responds to the Motion to Dismiss filed by Florida Power and Light Company (FPL). The motion should be denied in its entirety. As grounds therefore, Reliant Energy states:

Standard for Ruling on a Motion to Dismiss

1. Before turning to the arguments that FPL raises in its Motion to Dismiss Reliant Energy's Complaint, the Commission must bear in mind the standard for ruling on such a motion. As many courts have held, "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action . . . [T]he trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side . . . . Significantly, all material factual allegations of the complaint must be taken as true."[1] The application of this well-established standard to FPL's motion can lead only to a denial of that motion.

Reliant Energy's Allegations

2. As discussed above, all of Reliant's allegations must be taken as true. When they are, it is clear that Reliant has stated a cause of action for violation of the Commission's bid rule, Rule 25-22.082, Florida Administrative Code. In its Motion, FPL attempts to portray the Complaint as alleging only violations of the spirit of the rule. This is incorrect. For instance, in

its Complaint Reliant Energy alleges that FPL artificially understated its cost of constructing its self-build option, in direct violation of 25-22.082, Florida Administrative Code. (Reliant Energy further alleges that the deliberate understatement of self-build costs hampered competition by sending a false signal as to the bid that would be necessary to compete, and/or by providing a false standard against which to gauge the RFP responses.) In its Motion to Dismiss, FPL omits any reference to this allegation that FPL violated the express terms of Rule 25-22.082.

3. In its Complaint, Reliant Energy also alleges that, in direct violation of rule 25-22.082, Florida Administrative Code, FPL altered the "next generating unit" in its generation expansion plan after receiving responses to its RFP, without amending the RFP to permit respondents to bid against the different capacity addition. In its Motion to Dismiss, FPL ignores this separate allegation of a direct violation of the express and fundamental provisions of the Commission's rule.[2]

Reliant Alleged That the Conduct That Thwarts the Commission's Intent Constitutes a Violation of Rule 25-22.082

4. Essentially, FPL argues that the Commission is powerless to address a violation of the intent of Rule 25-22.082, if the particular behavior is not explicitly prohibited by the rule. According to this self-serving and flawed argument, FPL could engage in *any* conduct designed to undermine Rule 25-22.082 – no matter how blatantly discriminatory and anti-competitive – as long as the particular conduct was not expressly prohibited within the four corners of the rule. FPL's "logic" would require the Commission to attempt to anticipate each and every possible

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[1] *Varnes v. Dawkins,* 624 So.2d 349, 350 (Fla. 1st DCA 1993), citations omitted.

[2] In its Response, FPL cites case law for the proposition that, where the language of a rule is clear and unambiguous, there is no altering the plain meaning. Reliant Energy agrees. Rule 25-22.082(2) states: Prior to filing a petition for determination of need for an electrical power plant pursuant to Section 403.519, Florida Statutes, each investor-owned electric utility shall evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals (RFP). "At least one of FPL's next planned generating units was identified after the RFP was issued. Applying the "plain meaning" test, FPL has not subjected its next planned unit to an RFP and is therefore in violation of the rule.

blocking maneuver and discriminatory measure – no matter how absurd – and include it in a laundry list of items the retail-serving investor-owned utility cannot place in its RFP.[3] As will be demonstrated herein, the law is not so illogical, the Commission's rule is not so meaningless, and the Commission is not so helpless to respond to acts of defiance by utilities subject to its rules.

5. That FPL's argument is as legally wrong as it is absurd is illustrated in *Environmental Trust and Sarasota Environmental Investors, Inc. v. Department of Environmental Protection*, 714 So.2d 493, 498 (Fla. 1st DCA 1998). In that case, appellants contended that the DEP was powerless to deny reimbursement of factoring discounts and contractors' mark-ups when quantifying costs of environmental remediation because the DEP's rule did not expressly prohibit a claim for reimbursement of these items. The court rejected the argument:

> An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statues.

6. The purpose of the Commission's bidding rule is to ensure that investor-owned utilities select the most cost-effective option when adding capacity. Prior to selecting its self-build option, an investor-owned utility must issue an RFP, the parameters of which are set out in the rule. How the Commission will evaluate the utility's issuance, conduct, and evaluation of the RFP required by the rule in each individual case depends (as it did in the *Environmental Trust*

[3] For example, according to its logic, FPL could include in its RFP a requirement for a billion dollar security deposit or a requirement that a project be constructed only by an FPL affiliate. The rule does not expressly prohibit either requirement.

case) on the application of the Commission's rule to the "particular set of facts."[4] As discussed earlier, every conceivable scenario cannot possibly be anticipated in a rule.

7. In any event, FPL's argument must fail because FPL mischaracterizes Reliant Energy's allegations. Those allegations regarding onerous and commercially infeasible provisions in the areas of the unrealistic time frame during which bids were to remain open, onerous security requirements, outlandish provisions enabling FPL to unilaterally abrogate a contract, the arbitrary and unexplained exclusion of tolling arrangements, and the threat of penalizing submissions that took exception to onerous terms, are not confined to a contention that FPL violated the "intent" of the rule. In its Motion to Dismiss, FPL discusses several of Reliant Energy's allegations individually, but fails to take into account that in Paragraph 25 of the Complaint Reliant Energy also alleges that the cumulative effect of FPL's conduct was to thwart competition "in defiance and in direct violation of Rule 25-22.082."

Participation in a Determination of Need Proceeding is NOT The Sole Remedy for a Rule Violation

8. FPL alleges that the "exclusive" remedy for FPL's violation of 25-22.082 is for Reliant Energy to participate in FPL's need determination proceeding. In support of this flawed premise, FPL cites subsection (8) of the rule. This subsection states:

> The Commission shall not allow potential suppliers of capacity who were not participants to contest the outcome of the selection process in a power plant need determination.

9. Nowhere does this subsection state that it is the "exclusive" remedy for violations of the bid rule; rather, this subsection is a limitation or prohibition on participation by certain

[4] Clearly, an agency has authority to interpret its own rules. *See, i.e., In Re: Petition for determination that implementation of contractual pricing mechanism for energy payments to qualifying facilities complies with Rule 25-17.0832, Florida Administrative Code, by Florida Power Corporation,* Docket No. 940771-EQ, Order No. PSC 95-0201-FOF-EQ at 15 (Feb. 1995).

parties in need determination proceedings.

10. FPL then argues that if the Commission had meant to include a complaint provision in the rule, it would have done so. Like FPL's "intent" argument, discussed earlier, it is apparently FPL's view that if the Commission does not explicitly provide within a given rule that a complaint may be brought to address a violation of that rule, such a complaint is *prohibited.*

11. To follow FPL's logic would be to require the Commission to include, in each substantive rule, the statement that violations of the rule may be remedied via complaint. This attempt to tie the Commission's hands is nonsensical. More importantly, it flies in the face of Rule 25-22.036(2), Florida Administrative Code, which specifically contemplates the availability of a complaint proceeding to consider the alleged violation of a Commission rule, and 28-106.201, Florida Administrative Code, which authorizes the initiation of proceedings to address disputed issues of material fact.

Reliant Energy's Complaint is Timely

12. FPL's contentions with respect to "laches" and "estoppel" are, to be generous, misplaced.[5] First, FPL is wrong when it asserts that Reliant Energy accepted the onerous and commercially infeasible terms and conditions that are the subjects of its complaint. In the letter which accompanied its proposals, Reliant Energy clearly stated to FPL that it did not accept the terms of the RFP and informed FPL that – rather than state individual exceptions – Reliant Energy preferred to negotiate a total package.[6] FPL did not negotiate with Reliant Energy.

[5] One is tempted to plumb the irony in the contention by FPL – which undermined the Commission's rule, placed onerous and commercially infeasible demands in its RFP, changed its self-build options without informing RFP participants, and ultimately rejected all proposals, including offers to negotiate – that by Reliant Energy's effort to seek recourse before the Commission is "punitive" and that FPL is a victim.

[6] FPL's RFP schedule included a period of 5 months for the negotiation.

13. Second, FPL's mischaracterization of Reliant Energy's proposals aside, the doctrines of "laches" and "estoppel" are simply unavailable to FPL. As stated above, Reliant Energy offered to negotiate terms and conditions that would be mutually acceptable. Only when FPL rejected Reliant's proposal and announced its intent to construct 1900 MW of capacity itself could Reliant Energy know that the possibility of working through issues related to the onerous terms had been spurned.

14. Finally, the elements of estoppel which FPL sets out in its motion are simply inapplicable here.[7] Reliant Energy has made no material representation contrary to its current position. Nor has FPL changed its position to its detriment in any way – it rejected all bids and declared itself the winner! Further, even under circumstances (very different from those in this case) in which the contentions bear some resemblance to reality, laches and estoppel are affirmative defenses and are fact dependent. *The Florida Bar v. Rosemary Furman,* 451 So.2d 808 (Fla.1984). In the absence of circumstances not present here, laches and estoppel are affirmative defenses only and may not serve as the basis for a motion to dismiss. *Ramos v. Mast,* 789 So.2d 1226, 1227 (Fla. 4th DCA 2001).

The Commission Should Ignore FPL's Irrelevant and Erroneous Allusions to the Commission's Rulemaking Authority

15. In an obvious allusion to arguments that IOUs raised during a rule development workshop in February, in its motion FPL intimates that the Commission has no authority to adopt a rule requiring an RFP. It is worth mentioning that FPL, who claimed "laches" because Reliant Energy awaited the outcome of a 4-month RFP process before filing a complaint, waited eight

[7] The cases FPL cites in support of its position are totally inapposite. In *Council Brothers v. City of Tallahassee,* 634 So.2d 264 (Fla. 1st DCA 1994), the *bidder* complained that the City provided inaccurate information which the *bidder* utilized to formulate his bid. The court held that the City was estopped from using the information. In *McIlmoil v. McIlmoil,* 784 So.2d 557 (Fla. 1st DCA 2001), an ex-wife was estopped from collecting expenses from her ex-husband years after they were incurred. Neither of these cases is remotely applicable in this instance.

years and also conducted an RFP that purports (erroneously) to comply with the rule before raising the suggestion. The Commission should reject the argument, if it was intended as such, because it is not appropriately raised in a motion to dismiss Reliant Energy's Complaint[8] and more fundamentally because it is wrong. To adopt a rule, the Commission requires only general rulemaking authority and a specific statutory power to implement. The Commission properly cites its rulemaking authority in Rule 25-22.082, Florida Administrative Code. Section 403.519, F.S. empowers the Commission to consider whether the utility's proposal is the most cost-effective alternative. Among other things, Rule 25-22.082, F.S. implements this statutory power and task.

Reliant Energy's Requested Relief is Not Inconsistent

With the Rule or This Commission's Authority

16. In arguing that the Commission cannot grant the relief Reliant Energy seeks, FPL has put the cart before the horse. Reliant Energy has alleged numerous violations of the Commission's rule. After the Commission has heard the evidence, it will be the Commission's role to fashion a remedy that ensures that the FPL selects the most cost-effective capacity addition. Without a remedy, the Commission's rule would be meaningless. The available remedies cannot be prejudged before the case even begins.[9] (Notwithstanding the premature nature of FPL's contention, Reliant Energy asserts that the remedies identified in its complaint are within the statutory authority of the Commission to provide; further, the remedies that the Commission can apply are not limited to those specifically mentioned in Rule 25-22.082, Florida

[8] If FPL wishes to challenge the validity of the existing rule, the Administrative Procedures Act provides a mechanism for that purpose.

[9] By pointing out that the consideration of remedies is premature, by no means does Reliant Energy accede to the argument that the particular remedies identified in the Complaint are unavailable. For instance, in its Complaint Reliant Energy requests the Commission to invoke its authority under Section 403.519 to initiate a proceeding to determine the need for a power plant on its own initiation. FPL's motion ignores completely the range of actions and remedies available to the Commission under this provision.

Administrative Code.

Conclusion

17. The standard for a motion to dismiss is clear and must be strictly applied. FPL has failed to meet that standard and its motion should be denied.

WHEREFORE, Florida Power and Light Company's Motion to Dismiss should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reliant Energy Power Group, Inc.'s Response to Florida Power and Light Company's Motion to Dismiss was served via (*) Hand delivery and U.S. Mail this 27th day of March 2002 to the following:

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