

ORIGINAL

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 April 8, 2002.

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

Pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C.") CPV Cana, Ltd. ("CPV Cana"), files this Response to Florida Power & Light Company's ("FPL) Response in Opposition to CPV Cana Ltd.'s Petition to Intervene. Regardless of FPL's styling of its response to CPV Cana's Petition to Intervene filed in this proceeding, FPL's response is, in substance, a Motion to Dismiss, response to which is expressly authorized and contemplated in Rule 28-106.204, F.A.C. Accordingly, CPV Cana hereby files this Response, and in support, states the following:

I. Under the express terms of the Bid Rule and established administrative law principles, CPV Cana has standing in this proceeding.

The injuries CPV Cana alleges in its Petition to Intervene filed in this proceeding — which involves a Complaint by Reliant Energy to enforce the Florida Public Service Commission's ("Commission") Bid Rule 25-22.082, F.A.C. — clearly fall within the zone of interest of this proceeding. Accordingly, CPV Cana has standing to intervene and participate as a party in this proceeding.

Pursuant to the Bid Rule's requirements, FPL prepared and distributed to prospective Respondents, including CPV Cana, a Request for Proposals ("RFP") that ostensibly sought proposals

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for competitive alternatives to proposed capacity additions at its Martin, Ft. Meyers, and Midway electric generating facilities. As stated in its Petition to Intervene, CPV Cana was a respondent to FPL's RFP. Also as stated in its Petition to Intervene, CPV Cana, in good faith, expended substantial time and resources in preparing its Response to FPL's RFP. It is undeniable that as a respondent to the RFP, whose proposal was rejected by FPL, CPV Cana was directly and immediately injured by that rejection, nor does FPL dispute the existence of that injury. Rather, FPL argues that CPV Cana's substantial injury does not fall within the zone of interest of this complaint proceeding. However, as discussed herein, this position disregards the plain language of Rule 25-22.082, F.A.C., and established administrative law principles granting standing to persons similarly situated to CPV Cana.

Section 403.519, Florida Statutes ("F.S.") provides that in determining need for additional generating capacity by utilities, the Commission must consider the most "cost-effective capacity alternative available" to the utility's proposed generating capacity addition. Section 403.519, F.S. (emphasis added). The Commission's Bid Rule, Rule 25-22.082, F.A.C., which implements Section 403.519, F.S., expressly requires utilities to solicit "competitive proposals for cost-effective supply-side alternatives to the utility's next planned generating unit." Rule 25-22.082(1)(b), F.A.C. (emphasis added). By its express terms, the competitive interests of respondents to a utility's RFP are within the scope of the Bid Rule and Section 403.519, F.S., which is implemented by the Bid Rule. Indeed, it borders on the fatuous for FPL to argue that CPV Cana's injuries do not fall within the zone of interest of the Bid Rule, when the RFP process required by the Bid Rule was established precisely for the purpose of forcing utilities to solicit and consider **competitive supply-side alternatives** like that proposed by CPV Cana in its Response to FPL's RFP. CPV Cana clearly has

standing pursuant to the plain language of Rule 25-22.082, F.A.C., and Section 403.519, F.S., which is implemented by Rule 25-22.082, F.A.C.

Furthermore, FPL's position is contrary to established administrative case law in Florida holding that persons submitting proposals in response to RFPs, whose responses are rejected by the soliciting entity, have standing to challenge that rejection. In International Medical Centers, H.M.O., v. Department of Health and Rehabilitative Services, 417 So. 2d 734 (Fla. 1st DCA 1982), the Department of Health and Rehabilitative Services ("HRS") issued a Request for Proposals for providing prepaid health care to refugees in Dade County, and International Medical Centers ("IMC") and others responded to the RFP. HRS subsequently rejected all responses, including that submitted by IMC. In determining IMC had standing to challenge the rejection of its response, the court stated "[w]e have no difficulty in deciding that IMC and CAC were parties whose substantial interests were determined by the agency's decision to reject all bids and withdraw the RFP..." Id. at 736. See, e.g., Couch Construction Co., Inc. v. Department of Transportation, 361 So. 2d 172 (Fla. 1st DCA 1978); United States Service Industries-Florida v. Department of Health and Rehabilitative Services, 385 So. 2d 1147 (Fla. 1st DCA 1980). The great weight of case law in Florida supports CPV Cana's intervention in this proceeding.

In sum, the plain language of Rule 25-22.082, F.A.C., and Section 403.519, F.S., as well as fundamental principles of administrative law in Florida, militate that CPV Cana has standing to intervene and participate in this proceeding as a party.

2. FPL's Position that CPV Cana's Interests are Cognizable Only in a Determination of Need Proceeding is Incorrect.

FPL argues that the exclusive remedy for FPL's violation of Rule 25-22.082, F.A.C., is to intervene and participate in FPL's pending Determination of Need proceedings. In support thereof, FPL cites Rule 25-22.082(8), F.A.C., which provides: "[t]he 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." Nowhere in that subsection (or, for that matter, in any other portions of the Bid Rule or in Section 403.519, F.S.) are there provisions stating that determination of need proceedings are the exclusive avenue for raising and prosecuting Bid Rule violation claims like CPV Cana's. Rule 25-22.082, F.A.C., merely limits participation in determination of need proceedings to parties who participated in the selection of generating capacity process under the Bid Rule. Critically, FPL's position would have the Commission completely disregard the existence and applicability of Rule 25-22.036(2), F.A.C., which specifically states that "[a] complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or by any Commission rule or order." Reliant Energy's Complaint and CPV Cana's Petition to Intervene allege that FPL has committed numerous violations of Rule 25-22.082, F.A.C., through the conduct of its August 2001 RFP process for solicitation of alternatives for additional generation capacity for its Martin, Midway, and Ft. Meyers generating facilities. Under the plain language of Rule 25-22.036(2), F.A.C., this complaint proceeding is an appropriate avenue for redressing the Bid Rule violations alleged by CPV Cana's Petition to Intervene. FPL

would have the Commission completely disregard the availability of the complaint process to address FPL's violations of the Bid Rule.

III. FPL Mischaracterizes CPV Cana's Allegations in its Petition to Intervene

In its Response, FPL attempts to portray CPV Cana's Petition to Intervene as alleging only violations of the "spirit" of the Bid Rule. That is not correct. In its Petition, CPV Cana alleges that FPL artificially understated its cost of constructing the self-build option, in direct violation of Rule 25-22.082, F.A.C. Moreover, CPV Cana's Petition alleges specific violations of Rule 25-22.082 by FPL in understating its costs in its RFP and by completely failing to identify its Manatee facility as a site at which additional capacity may be added — thereby providing false information regarding the contents of a proposal that would be competitive, and by depriving respondents of the ability and opportunity to prepare a response addressing additional capacity at the Manatee site. These deficiencies violate the plain language of Rule 25-22.082(4), F.A.C., and other provisions of the Bid Rule, and were specifically alleged in CPV Cana's Petition to Intervene.

IV. The Commission has the Statutory Authority to Grant the Relief Requested by CPV Cana in this Proceeding.

As discussed in Section II herein, the Commission has the statutory and rule authority to grant the relief CPV Cana requests in this proceeding. By the express terms of Rule 25-22.036, F.A.C., the Commission has the authority to conduct proceedings to address complaints filed by persons claiming that a person subject to the Commission's jurisdiction has violated a statute enforced by the Commission or a Commission rule or order. After the Commission has heard the

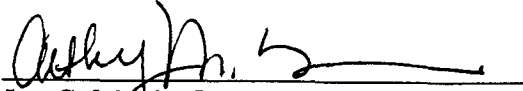
evidence, the Commission has the authority under Chapter 366, F.S., and incident to its jurisdiction to enforce Rule 25-22.082, F.A.C., to fashion a remedy that requires FPL to select the most cost-effective capacity addition alternative. To accept FPL's position would, in essence, render the Commission powerless to enforce Rule 25-22.082, F.A.C., against any violations of the rule, no matter how egregious. Not only does FPL's position amount to an argument that the Commission lacks the power to enforce its own rules, but it also disregards controlling case law in Environmental Trust v. Department of Environmental Protection, 714 So. 2d 493 (Fla. 1st DCA 1998), in which the court held that agencies may interpret and explain their own rules to address a particular set of facts and circumstances without having to adopt new rules to address every possible instance or variation on a theme. The court in Environmental Trust specifically recognized that if that were the case, "...private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue." Id. at 498. In this case, that is precisely what FPL attempts to do. The court in Environmental Trust noted that matters involving the interpretation and application of an agency rule to a specific set of facts is appropriately addressed in Section 120.57 adjudicatory proceedings — which is the precisely the type of proceeding that would be conducted pursuant to Reliant's Complaint.

Conclusion

For the reasons discussed herein, FPL's Response in Opposition to CPV Cana's Petition to Intervene should not be granted. As addressed in its Petition to Intervene and in this Response, CPV Cana should be permitted to intervene as a person whose substantial interests will be affected by this

proceeding, and permitted to participate as a party to this proceeding.

Respectfully submitted this 8th day of April, 2002.



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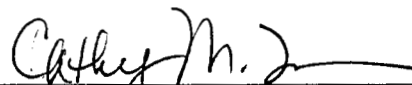
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing CPV Cana, Ltd.'s Response to Florida Power & Light Company's Response in Opposition to Petition to Intervene was served this 8th day of April, 2002 by U.S. Mail to the following persons:

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