

State of Florida

Public Service Commission

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COMMISSION
CLERK

DATE: April 11, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (HARRIS, BROWN)
DIVISION OF ECONOMIC REGULATION (HAFF) *WHA*

*Not for MOB
RJ JDJ*

RE: DOCKET NO. 020175-EI - COMPLAINT OF RELIANT ENERGY POWER
GENERATION, INC. AGAINST FLORIDA POWER & LIGHT COMPANY FOR
ALLEGED VIOLATION OF RULE 25-22.082, F.A.C.

AGENDA: 04/23/02 - REGULAR AGENDA - MOTION TO DISMISS - INTERESTED
PERSONS MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020175.RCM

CASE BACKGROUND

In August of 2001, Florida Power and Light Company (FPL) issued a Request for Proposals (RFP) for additional generating capacity to fill its projected capacity needs in 2005 and 2006. FPL evaluated numerous proposals from 15 respondents to the RFP, along with several of its own proposals to supply the needed capacity. In February of 2002, FPL announced that it would not select any of the respondents to its RFP to build its capacity additions, but instead would seek certification of two new power plants it would build itself on its existing Martin and Manatee plant sites. FPL filed its Petitions for Certification of the plants with the Department of Environmental Protection in February.

When Reliant Energy Power Generation, Inc. (Reliant), a respondent to FPL's RFP, learned that FPL intended to seek certification of its own new power plants at Martin and Manatee, Reliant filed a complaint alleging that FPL had violated the

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Commission's Rule on the selection of generating capacity, Rule 25-22.082, Florida Administrative Code (the Rule). Reliant filed its complaint on February 28, 2002.

Thereafter, FPL filed a Motion to Dismiss Reliant's complaint on March 20, 2002, and two Petitions for Determination of Need for the Martin and Manatee plants on March 22, 2002 (Docket Nos. 020262-EI and 020263-EI). Reliant filed a Response to the Motion to Dismiss on March 27, 2002. Neither party specifically requested oral argument. This recommendation addresses FPL's Motion to Dismiss Reliant's Complaint. The Commission has jurisdiction to address the motion pursuant to Sections 120.569, 350.127, 366.095, and 403.519, Florida Statutes, and Rules 25-22.082 and 25-22.036, Florida Administrative Code.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission deny Florida Power and Light Company's Motion to Dismiss?

RECOMMENDATION: Yes. The Commission should deny Florida Power and Light Company's Motion to Dismiss. Reliant's Complaint states a cause of action upon which relief can be granted. The Commission should consolidate the Complaint Docket with the Need Determination Dockets (020262-EI and 020263-EI) for purposes of administrative efficiency. (Harris, Brown)

STAFF ANALYSIS:

The Pleadings

In its Complaint, Reliant alleges that FPL has violated the Request for Proposal (RFP) process required by Rule 25-22.082, Florida Administrative Code. Reliant alleges that FPL violated the Rule by deliberately understating the costs of its own self-build options; placing commercially infeasible terms in the RFP that bidders were required to accept; requiring bidders to post excessive amounts of completion security; changing the location or "target" of the proposals (as to where the plant was to be constructed); refusing to consider arrangements where FPL would provide fuel as well as purchase the plant output; and failing to negotiate with bidders who submitted bids as the RFP required. Reliant requests that the Commission provide several forms of

relief to remedy the Rule violations. Reliant asks the Commission to rule that FPL violated both the letter and the spirit of the Rule; declare the RFP to be a nullity; require FPL to issue a new RFP for the Manatee proposal, which would be submitted to the Commission for review of its terms prior to issuance and be evaluated by an independent person; conduct a review of the Martin responses and determine the most cost effective alternative; and provide any other relief the Commission deems appropriate.

In its Motion to Dismiss, FPL makes four arguments for dismissal of the Complaint. First, FPL claims that the exclusive and proper means of addressing a violation of Rule 25-22.082 is to contest the Petition for Determination of Need. Second, FPL argues that violation of the intent of a rule does not create a cause of action. Third, FPL argues that the Complaint is untimely as to the allegations of the defects in the RFP itself. Fourth, FPL argues that the Commission does not have the authority to grant the relief requested.

In its response to the Motion to Dismiss, Reliant contends that its Complaint alleges factual issues that are sufficient to state a cause of action for which the Commission can grant relief. Reliant argues that participation in a need determination is not the exclusive remedy for violation of the Rule, since the failure to explicitly authorize other proceedings does not equate to a prohibition on other proceedings. Third, Reliant also argues that the doctrines of estoppel, timeliness, and laches are inappropriate grounds to dismiss its complaint. Finally, Reliant argues that a challenge of the Commission's rulemaking authority cannot be made in a Motion to Dismiss, nor can FPL claim there is no relief the Commission could grant should it find a violation of the Rule. In summary, Reliant asks that the Motion be denied for failure to meet the strict standard for granting a motion to dismiss.

Analysis

The Commission's consideration of FPL's Motion to Dismiss Reliant's Complaint is guided by the well-established legal standard described in Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993); "The function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." In determining the sufficiency of the facts alleged, the Commission should confine its consideration to the petition and

the grounds asserted in the motion to dismiss, Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), and construe all material allegations against the moving party. Mathews v. Mathews, 122 So. 2d 571 (Fla. 2nd DCA 1960). The complaint should be viewed in the light most favorable to Reliant in determining whether it is cognizable under the Commission's regulatory statutes and rules.

The central allegation of Reliant's complaint is that FPL violated Rule 25-22.082, Florida Administrative Code, the Commission's so-called "bidding rule" (Attachment A), relating to FPL's recent RFP for generating capacity that it needs in 2005 and 2006. Subsection (2) of Rule 25-22.082 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).

Subsection (1)(a) of the Rule defines "next planned generating unit" as:

the next generating unit addition planned for construction by an investor-owned utility that will require certification pursuant to Section 403.519, Florida Statutes.

The Rule also requires timely notification of an RFP, a general description of the next planned generating unit, "including its planned in-service date, MW size, location, fuel type and technology. . .", and a comprehensive list of items that a utility must include in its RFP. Rule 25-22.082(3) and (4), Florida Administrative Code.

The material facts Reliant alleges to support its claim that FPL violated the Commission's Rule are: 1) FPL did not include the Manatee project, one of the projects for which it has requested certification, in its RFP; 2) FPL deliberately understated the costs of the projects it did include in the RFP; 3) FPL included onerous terms in the RFP; 4) FPL refused to consider any "gas tolling" proposals in responses to the RFP; and 5) FPL violated the terms of the RFP itself by failing to select or negotiate with a short list of respondents with the best proposals.

Taking these material allegations as true, and viewing them in the light most favorable to Reliant, staff believes that they are clearly sufficient to state a cause of action against FPL for violation of the Commission's Rule.

As to the first ground for dismissal alleged in FPL's Motion, staff does not agree that a determination of need proceeding is the sole proceeding in which a violation of Rule 25-22.082 can be alleged. While the Rule permits challenges to a utility's RFP process in a need determination proceeding, the Rule does not state that need determination proceedings are the sole venue to contest violations. Need determinations are by statute held in extremely short time frames. Were a rule violation to be raised, and found to have occurred by the Commission during such a need determination proceeding, any remedial action ordered could vastly extend the time frame of the proceeding and the ability of the utility to obtain certification for needed capacity in a timely fashion. A complaint raised outside of a need determination proceeding allows persons with substantial interests who believe there is a violation of a rule to raise that issue prior to the need determination proceeding, without delaying the need determination itself.

With respect to FPL's second ground for dismissal concerning violation of the intent of Rule 25-22.082, Reliant recites several acts and facts which it alleges to be actual violations of the Rule. Taken as true, these violations state a cause of action upon which the Commission could grant relief. Reliant does allege that the totality of the circumstances demonstrate that the intent of the Rule was violated, but also that the Rule itself was violated. Given the standard for consideration of a motion to dismiss, staff believes FPL's Motion can not be granted on the ground that Reliant's Complaint alleges a violation of the intent of the Rule alone, since Reliant has alleged factual violations as well as affirmative acts or omissions.

As its third ground, FPL argues that Reliant's Complaint should be dismissed on grounds of timeliness, laches, and estoppel. None of these grounds would support a motion to dismiss. These issues are fact dependent, and for purposes of a motion to dismiss, the facts must be taken in the light most favorable to the Petitioner. The doctrines of timeliness, laches, and estoppel are affirmative defenses, which are not properly raised in a motion to dismiss. Hough v. Menses, 95 So. 2d 410 ("[f]urthermore, the

burden is on the defendant to prove his affirmative defenses, which cannot be done in proceedings on a motion to dismiss").

Staff believes that FPL's fourth ground for dismissal-that the Commission has no authority to require RFPs, to promulgate Rule 25-22.082, or to grant any relief to Reliant for violation of the Rule-are without merit. Rule 25-22.082, Florida Administrative Code, is a validly promulgated rule, adopted in 1993. The Rule has been reviewed by the Commission and the Joint Administrative Procedures Committee staff for its continued validity under the provisions of Sections 120.545 and 120.536, Florida Statutes. Any further challenge to the Commission's authority to act under the provisions of this Rule is cognizable only in a rule challenge procedure before the Division of Administrative Hearings. It is not an appropriate ground to dismiss this Complaint. In addition, the Rule clearly implements Section 403.519, Florida Statutes, which is listed as the enabling statute. The Commission has the authority to promulgate rules which allow it to apply and implement the powers granted by statute.

Equally, the Commission can fashion relief for violation of its rules. Whether the Commission can grant the specific relief Reliant requests is not the standard for consideration; the standard for a motion to dismiss is whether the facts alleged state a cause of action for which some relief can be granted. As the Commission can and does enforce its rules, and can and does fashion relief appropriate to a particular proceeding, this argument must fail.

Reliant alleges that FPL violated the actual terms of its own RFP, issued pursuant to the Rule. Staff does not believe that FPL can reasonably contend that the Commission lacks the authority to adopt this Rule requiring the RFP process at this juncture after violating that process. The correct course of action would be to challenge the Rule or contest its applicability prior to violating the Rule.

Given that the standard for review of a Motion to Dismiss is whether the facts alleged, taken in a light most favorable to the Petitioner, state a cause of action upon which relief can be granted, Staff recommends that Reliant's Complaint states such a cause, and FPL's Motion to Dismiss should be denied.

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Staff has also recommended that this docket should be consolidated with the Need Determination Dockets, Nos. 020262-EI and 020263-EI, for purposes of administrative efficiency. The timing of these cases supports that procedure in this instance. The parties recognize that the issues Reliant raises are substantially similar to issues that will be addressed in the need determination dockets. The parties are also willing to adhere to the hearing schedule and other related deadlines for the need determination dockets. Under these circumstances, it makes sense for the Complaint to be consolidated with the need determinations in order to accomplish administrative efficiency. Also, except for any relief that would require revisions to Rule 25-22.082, the relief Reliant requests is available in the need determination proceedings. For the above reasons, staff recommends that the Complaint Docket, No. 020175-EI be consolidated with the need determination dockets, Nos. 020262-EI and 020263-EI.

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ISSUE 2: Should this Docket be closed?

RECOMMENDATION: No. If the Commission adopts Staff's recommendation and denies FPL's Motion to Dismiss, this docket should be held open to allow for further proceedings.

STAFF ANALYSIS: If the Commission adopts Staff's recommendation, and denies FPL's Motion to Dismiss, then Reliant's Complaint will remain open and should be consolidated with Docket Nos. 020262-EI and 020263-EI.

ATTACHMENT A

25-22.082 Selection of Generating Capacity.

(1) Definitions. For the purpose of this rule, the following terms shall have the following meaning:

(a) Next Planned Generating Unit: the next generating unit addition planned for construction by an investor-owned utility that will require certification pursuant to Section 403.519, Florida Statutes.

(b) Request for Proposals (RFP): a document in which an investor-owned utility publishes the price and non-price attributes of its next planned generating unit in order to solicit and screen, for subsequent contract negotiations, competitive proposals for supply-side alternatives to the utility's next planned generating unit.

(c) Participant: a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a utility's RFP. A participant may include utility and non-utility generators as well as providers of turnkey offerings and other utility supply side alternatives.

(d) Finalist: one or more participants selected by the utility with whom to conduct subsequent contract negotiations.

(2) 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).

(3) Each investor-owned utility shall provide timely notification of its issuance of an RFP by publishing public notices in major newspapers, periodicals and trade publications to ensure statewide and national circulation. The public notice given shall include, at a minimum:

(a) The name and address of the contact person from whom an RFP package may be requested;

(b) A general description of the utility's next planned generating unit, including its planned in-service date, MW size, location, fuel type and technology; and

(c) A schedule of critical dates for the solicitation, evaluation, screening of proposals and subsequent contract negotiations.

(4) Each utility's RFP shall include, at a minimum:

(a) A detailed technical description of the utility's next planned generating unit or units on which the RFP is based, as

well as the financial assumptions and parameters associated with it, including, at a minimum, the following information:

1. A description of the utility's next planned generating unit(s) and its proposed location(s);
 2. The MW size;
 3. The estimated in-service date;
 4. The primary and secondary fuel type;
 5. An estimate of the total direct cost;
 6. An estimate of the annual revenue requirements;
 7. An estimate of the annual economic value of deferring construction;
 8. An estimate of the fixed and variable operation and maintenance expense;
 9. An estimate of the fuel cost;
 10. An estimate of the planned and forced outage rates, heat rate, minimum load and ramp rates, and other technical details;
 11. A description and estimate of the costs required for associated facilities such as gas laterals and transmission interconnection;
 12. A discussion of the actions necessary to comply with environmental requirements; and
 13. A summary of all major assumptions used in developing the above estimates;
- (b) A schedule of critical dates for solicitation, evaluation, screening of proposals and subsequent contract negotiations;
- (c) A description of the price and non-price attributes to be addressed by each alternative generating proposal including, but not limited to:
1. Technical and financial viability;
 2. Dispatchability;
 3. Deliver ability (interconnection and transmission);
 4. Fuel supply;
 5. Water supply;
 6. Environmental compliance;
 7. Performance criteria;
 8. Pricing structure; and
- (d) A detailed description of the methodology to be used to evaluate alternative generating proposals on the basis of price and non-price attributes.
- (5) As part of its RFP, the utility shall require each participant to publish a notice in a newspaper of general circulation in each county in which the participant's proposed generating facility would be located. The notice shall be at

least one-quarter of a page and shall be published no later than 10 days after the date that proposals are due. The notice shall state that the participant has submitted a proposal to build an electrical power plant, and shall include the name and address of the participant submitting the proposal, the name and address of the utility that solicited proposals, and a general description of the proposed power plant and its location.

(6) Within 30 days after the utility has selected finalists, if any, from the participants who responded to the RFP, the utility shall publish notice in a newspaper of general circulation in each county in which a finalist has proposed to build an electrical power plant. The notice shall include the name and address of each finalist, the name and address of the utility, and a general description of each proposed power plant, including its location, size, fuel type, and associated facilities.

(7) Each electric utility shall file a copy of its RFP with the Commission.

(8) 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 proceeding.

(9) The Commission may waive this rule or any part thereof upon a showing that the waiver would likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.

Specific Authority 350.127(2), 366.05(1), 366.051 FS. Law Implemented 403.519, 366.051 FS. History-New 1-10-94.