

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition To Determine Need For An Electrical Power Plant in Martin County By Florida Power & Light Company. ) Docket No. 020262 - EI ) Dated: April 22, 2002 )

In re: Petition To Determine Need For An Electrical Power Plant in Manatee County By Florida Power & Light Company. ) Docket No. 020263 - EI ) Dated: April 22, 2002 )

MOTION OF NON-PARTY AES CORAL FOR PROTECTIVE ORDER

Non-Party AES Coral ("AES"), pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, Sections 366.093 and 812.081, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, respectfully moves the Florida Public Service Commission ("Commission") for a protective order prohibiting Florida Power & Light ("FPL") from disclosing AES' bid proposals to the Intervenor in these consolidated docket proceedings.

Introduction

FPL should be prohibited from producing AES' bid proposals to Intervenor because: (1) AES' bid proposals contain highly confidential proprietary business information, disclosure of which will cause irreparable harm to AES and its business interests; (2) AES' bid proposals are not relevant in any way to Intervenor's challenge in these docket proceedings, and are being sought only to give Intervenor an unfair competitive advantage since non-intervening bidders will not be given similar access to bid proposals; (3) FPL has already provided any

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arguably relevant information by its filing of the evaluations of the bid proposals and its Need Study Document; (4) production of AES' Bid Proposals may further be unnecessary in light of the dispositive motion for summary final order pending and set for argument on May 3, 2002; and (5) the proposed confidentiality agreement has been agreed to by FPL and Intervenors *only*, and does *not* protect the interests of AES and other non-intervening bidders. The Commission has the authority and discretion to grant the relief requested herein. See Florida Society of Newspaper Editors v. Florida Public Service Commission, 543 So.2d 1262, 1264-66 (Fla. 1<sup>st</sup> DCA 1989).

### Memorandum

AES Coral, a Delaware corporation, submitted detailed bid proposals ("AES' Bid Proposals") in response to FPL's Request for Proposals issued on August 13, 2001 ("RFP"). FPL's RFP requested capacity proposals for 1,150 MW of capacity to meet FPL's 2005 needs, and an additional 600 MW of capacity for FPL's 2006 needs. AES' Bid Proposals were deemed responsive to the RFP, and, like all other responsive bids, were evaluated both by FP&L and by an independent third-party evaluator, Sedway Consulting, Inc. (the "Evaluations").

As a result of the Evaluations, FPL determined that the FPL self-build portfolio of Manatee Unit 3 and Martin Unit 8 was the most cost-effective alternative to meet FPL's 2005 and 2006 capacity needs. FPL thus rejected all of the bids submitted in response to the RFP, including AES' Bid Proposals.

Consistent with its determination to self-build, FPL filed petitions for determinations of need for electrical power plants (“Petitions”), which Petitions are the subjects of these pending consolidated docket proceedings. FPL also filed a detailed Need Study Document with appendices, discussing the Evaluations, final costs comparisons and evaluation of non-price attributes allegedly supporting FPL’s determination to self-build.

Certain bidders such as Reliant Energy Power Generation, Inc. (“Reliant”), Calpine Energy Services, L.P. (“Calpine”) and others have been granted permission to intervene in these docket proceedings (collectively, “Intervenors”). AES, however, has *not* sought permission to intervene, and is *not* party to these proceedings.

Intervenors are challenging FPL’s Petitions on grounds that FPL violated Rule 25-11.082, Fla.Admin.Code (the “Bid Rule”). Intervenors specifically allege that FPL understated the costs of its self-build options in violation of the Bid Rule; placed onerous and commercially infeasible terms in the RFP; and improperly changed its self-build option. Intervenors seek an order from this Commission requiring FPL to issue a new Request for Proposals that complies with the Bid Rule.

Intervenors Calpine and Reliant have also filed a Joint Motion for Summary Final Order in these docket proceedings, alleging that there are *no* disputed issues of material fact relative to FPL’s failure to comply with the Bid Rule, and that dismissal of FPL’s Petitions is required as a matter of law. Intervenors

have requested oral argument and expedited consideration of their Joint Motion. Oral Argument on this dispositive motion is set for May 3, 2002.

Notwithstanding the pending dispositive Joint Motion for Summary Final Order, various Intervenors have served requests for production of documents upon FPL. These requests demand, inter alia, all bid proposals submitted in response to the RFP, including AES' Bid Proposals.

On April 18, 2002, FPL notified all RFP bidders, including AES, that it intended to produce all bid proposals to the Intervenors. FPL announced that it was working with Intervenors to draft a confidentiality and non-disclosure agreement acceptable to FPL and the Intervenors, and that an agreement would be finalized at a meeting to be held the following day. Non-intervenor bidders such as AES were invited to attend the meeting.

AES' counsel attended the meeting on April 19, 2002 by telephone, but suggested comments were rejected. FPL and the Intervenors in attendance made minor revisions and signed a marked-up copy of the draft agreement. Intervenors announced their intent to file a joint motion with FPL seeking approval of the confidentiality agreement by the Pre-Hearing Officer on the morning of April 22, 2002.

FPL has advised AES and the other non-intervenor bidders that once the confidentiality agreement has been approved by the Pre-Hearing Officer, all bid proposals, including AES' Bid Proposals, will be produced to the Intervenors. AES

and other non-intervening bidders will *not*, however, be given access to *any* of the bid proposals.

AES' Bid Proposals contain highly proprietary confidential business information. AES' Bid Proposals contain trade secrets as defined in Section 812.081, Florida Statutes, highly proprietary technology descriptions, and technical / patented information owned and used by AES in its business ventures throughout the world. AES will suffer irreparable harm if this information is disclosed to Intervenors, all of whom are competitors of AES and the other non-intervening bidders. Disclosure of AES' Proposals at this time is also highly prejudicial, and would give Intervenors an unfair competitive advantage in any future request for proposals. The confidentiality agreement proposed by FPL and the Intervenors is completely insufficient, and does *not* protect the interests of AES and the other non-intervening bidders.

Moreover, AES' Bid Proposals should not be produced because they are simply *not relevant* to these docket proceedings, and will not lead to any discovery admissible at the hearing on the Petitions. As evident by their motions seeking intervention, the Intervenors are challenging *only FPL's compliance with the Bid Rule*, not any bidder's compliance with the Rule. AES' Bid Proposals are simply not at all relevant to any such challenge. Without some showing by Intervenors why AES' Bid Proposals are relevant to these docket proceedings, no access to these documents should be permitted.

AES thus seeks a protective order prohibiting FPL from producing any of AES' Bid Proposals until all the following conditions have been met: the Commission rules on the Joint Motion for Summary Final Order; the Commission has determined the Intervenors have shown good cause for obtaining access to such documents, including showing why such documents are necessary to prove their challenges in these docket proceedings; and if any documents continued in the proposal are to be produced, that FPL and the Intervenors be compelled to enter into a confidentiality agreement that protects the interests of the non-intervening bidders and is acceptable to AES; and, finally, if AES' Bid Proposals are ordered to be produced, any such order should also give AES access to proposals submitted by all other bidders as well.

**Representation Under Rule 28-106.204, Fla. Admin.Code**

Undersigned counsel represents that this motion will be opposed by the various Intervenors who also opposed suggested revisions to the confidentiality agreement.

**Request for Oral Argument**

AES respectfully suggests that oral argument on this motion may well be helpful to an understanding of the issues, and thus requests the opportunity to be heard.

## Conclusion

For the foregoing reasons, Non-Party AES Coral requests that its motion for protective order be granted as requested herein, and that FPL be prohibited from producing the proposals submitted by AES Coral to Intervenors in these consolidated docket proceedings.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing was furnished

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